UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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IN RE: AUTOMOTIVE PARTS
ANTITRUST LITIGATION

MDL NO. 2311
_____/

STATUS CONFERENCE & MOTION HEARINGS

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan

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Detroit, Michigan

Wednesday, January 20, 2016

At about 10:03 a.m.

— — —

(Court and Counsel present.)

THE CASE MANAGER: Please rise.

The United States District Court for the Eastern District of Michigan is now in session, the Honorable Marianne O. Battani presiding.

You may be seated.

The Court calls Case No. 12-md-2311, In Re: Automotive Parts Antitrust litigation.

THE COURT: Good morning, everyone.

ATTORNEYS: (Collectively) Good morning, Your Honor.

THE COURT: Looks like there are more of you today. I don't know why that is. Thank you for bringing the president in with you, that's very nice, and the auto show. I hope you all didn't have too much trouble with the various things going on but at least you don't have snow to deal with here, but maybe as you go home you are going to have problems but anyway we don't have a long agenda today so let's see.

The first matter on the agenda is the preliminary approval, and I don't -- there is nothing to argue here, the Court has signed these -- will sign these documents. Does

anybody have any comment on that, Fujikura or Sumitomo?

MR. REISS: Good morning, Your Honor. Will Reiss for the end payor plaintiffs.

With respect to the preliminary approval orders, no, we are just requesting that Your Honor sign them, but it is in connection with the motion to disseminate notice that we filed last week. And what that is is that is a notice as the Court may recall several months ago you approved our motion to disseminate notice of the Hitachi and T.RAD settlements, what we are looking to do now is to do a combined notice program which includes both of those settlements and in addition settlements with nine defendant families, we would include them all on the same track. We had originally in the papers that we submitted to you in the proposed order requested a final approval hearing date of May 4th, that's what Your Honor had originally scheduled for the T.RAD and Hitachi settlements, but we realize the status conference is the following week on May 11th so if it is convenient for Your Honor what we would request is in the afternoon if Your Honor is available to set aside the afternoon for final approval hearings. We would have to specify a time in the notice so what we would request I understand some counsel are unavailable in the morning so if we could do 3:00 on May 11th if you are available for --

THE COURT: Okay. Molly, just take a note of that.

MR. REISS: Just one thing to add. In order for us to commence our notice program I think we have a drop-dead date of the 27th of this month, so I understand the Court's busy but if there is any way you could enter the order in advance of that so we could advance the notice program.

THE COURT: If you get the orders in here and they are all set --

MR. REISS: Yes, I will just need to change it to specify the new final approval date and we will get that to you today.

THE COURT: That has to be done, like you say, within two weeks?

MR. REISS: Within one week. Okay. Thank you.

THE COURT: All right. Thank you.

The next item is the dismissal of the public entity plaintiffs in the wire harness. I think we did a joint stipulation. Who is going to speak to that?

MR. BARRETT: Your Honor, are we going to discuss the new settlements?

THE COURT: Pardon me? Do you want to come up on that? The parties on that entered a joint stipulation, but I need an order closing this case if that's --

MS. SALZMAN: We are here for the first item on the agenda, I think that's what Mr. Barrett was requesting is the status of settlements if Your Honor wanted that status?

THE COURT: I'm sorry.

MS. SALZMAN: Hollis Salzman for end payors.

MR. BARRETT: Don Barrett for auto dealers.

THE COURT: Okay.

MS. SALZMAN: We just want to let the Court know on behalf of our two classes we will have at least three settlements to present to the Court in the upcoming weeks. One of the settlements is with a very important defendant, and it will involve significant cooperation and a significant monetary value for the classes.

MR. BARRETT: It is a defendant involved in a number of cases.

THE COURT: Oh, good.

MS. SALZMAN: Thank you.

THE COURT: Now, do you need a hearing date on that?

MR. BARRETT: Not right now, Your Honor, but within a week or ten days we will be able to talk to the Court about that. All the parties are moving expeditiously to get it properly papered -- to get them properly papered.

MS. SALZMAN: After the settlements are finalized and we will submit preliminary approval papers likely again without the need for a hearing, but we'll advise the Court at that time. Okay. Thank you.

THE COURT: Sounds good. Thank you.

MR. KANNER: Your Honor, good morning, Steve Kanner on behalf of the direct-purchaser plaintiffs, still on Roman numeral I.

THE COURT: Okay.

MR. KANNER: Before that closes, I wanted to advise the Court that we have two settlements in the wire harness matter. The first is with Tokai Rika, there is an MOU in place and we'll be putting together the settlement agreement shortly and presenting it to the Court.

The second matter is well along, the settlement agreement is not completed, and that defendant prefers not to have its name identified until such time as we have completed the settlement agreement. In both cases I would expect to be able to notify the Court through your clerk and through motions for preliminary approval within the next few weeks.

THE COURT: Good. Thank you, Mr. Kanner.

MR. KANNER: Thank you, Your Honor.

THE COURT: Anyone else?

MR. PARKS: Your Honor, Manly Parks on behalf of the truck and equipment dealer plaintiffs.

We similarly have reached agreement in principle with one of the defendants in one of the cases. The defendant again chooses not to have their name identified at this point so we will be reporting to the Court in the near future about that.

THE COURT: Very good. More? More settlements? No. Okay.

All right. Then we will move on to B. Who here is going to -- anybody on B?

MR. CHERRY: I will speak to that, Your Honor.

THE COURT: That's really more information --

MR. CHERRY: Yes, Your Honor. Steve Cherry of Wilmer Hale for Denso, and this case for the wire harness defendants.

Yes, there was an intention for them to just dismiss everything and I believe just to be out of the MDL. Is there something more that needs to be filed?

THE COURT: We need an order to get it off the docket.

MR. CHERRY: A proposed order?

THE COURT: Yes, so even though we know there was this joint stipulation it still requires an order.

MR. CHERRY: Okay. We will take care of that. Thank you.

THE COURT: Thank you, Mr. Cherry.

The next one is the Denso group I believe, the motion to consolidate claims and --

MR. WILLIAMS: Good morning, Your Honor. Steve Williams for the end payor plaintiffs.

I don't think there was anything about the

substance of this to address unless the Court had any questions, but what we did --

THE COURT: No, I think you need a briefing schedule, don't you?

MR. WILLIAMS: We have a briefing schedule, what we do not have is a hearing date. We have a briefing schedule in which briefing would be completed on February 12th, and what we would like to do is set a date, the Court's next available date after February 12th after you have had sufficient time to review the papers.

THE COURT: Okay. I think maybe March 16th. Let me see -- it is not the 16th, it is the 15th. How about the 15th at 10:00 in the morning, is that good?

MR. WILLIAMS: It is for the end payors.

THE COURT: How about for the defendants, Mr. Cherry?

MR. CHERRY: Your Honor, I think I can make that work.

THE COURT: If you have a problem let me know and I can take care of it right now.

MR. CHERRY: I'm just looking. I'm sorry, I just have a spring break with my children planned right in there.

THE COURT: We want to accommodate that.

MR. CHERRY: Okay.

THE COURT: Is it that week or you don't know?

MR. CHERRY: It is that week or the week after. Can we assume it is okay and I will let you know if that's a problem?

THE COURT: Okay. Let's set it for March 15th at 10:00 a.m.

MR. WILLIAMS: Thank you, Your Honor.

THE COURT: Do you want to get another date just in case so that we don't have to --

MR. CHERRY: The week before, does that work?

THE COURT: Molly is just reminding me that the end payors' motion and then the auto dealers have a same motion that is really the same so we should do them on the same date.

MR. WILLIAMS: I apologize, I should have been more explicit. That date was for both, for the end payors and the auto dealers, it would all be done at the same time.

THE COURT: All right. So then let's look to see for a backup date -- I'm not sure if the auto dealers' briefing is done.

MR. WILLIAMS: It is.

THE COURT: Okay. Good. Let's go back. We could do it on Wednesday, March 9th at 10:00 a.m.?

MR. CHERRY: I'm sure that date works.

THE COURT: Okay. So just to be sure, the March 15th date is the first date, and if that doesn't work

then we will go back to March 9th, that's a Wednesday.

MR. WILLIAMS: And both at 10:00 a.m.?

THE COURT: Both at 10:00 a.m.

MR. WILLIAMS: Thank you, Your Honor.

MR. CHERRY: Thank you, Your Honor.

THE COURT: All right. That takes care of one and two under C, so we are at D, the status of discovery in parts where the stay has been lifted. The Court just added that because I wanted to know what was next for those parts.

MS. TRAN: Good morning. Elizabeth Tran with Cotchett, Pitre & McCarthy for the end payor plaintiffs. I will provide the Court with a brief update in wire harness, bearings and AVRP.

In wire harness concerning documents, guilty-pleading defendants made their DOJ productions to us in mid 2012, we have since reviewed this. After the Court resolved motions to dismiss in June of 2013, we served written discovery, including comprehensive interrogatories and requests for productions, on defendants in 2013, 2014 and 2015. We've completed transactional data negotiations though there are some pending questions for defendants. The parties have completed custodian and search term negotiations subject to plaintiffs' review of defendants' productions. And to date we have received some productions from all defendants. Defendants are to complete their productions by next month.

As to depositions of wire harness defendants, the Court lifted the stay on merits depositions in June 2014. The parties weren't able to agree on a wire harness deposition protocol until June 2015 after extensive briefing and multiple conferences with the Special Master. Depositions of defendants' witnesses began earlier this month. Plaintiffs have confirmed roughly 36 depositions so far. We have also interviewed several key witnesses from various defendant groups in wire harness.

THE COURT: Okay.

MS. TRAN: As to bearings, the Court granted the DOJ's request to stay discovery in bearings among other cases in December 2013. Although the Court resolved motions to dismiss in August 2014 the discovery stay remained in effect until January 2015 when the Court reported that the DOJ was no longer seeking a stay in bearings, so discovery largely began last spring.

Regarding documents, most defendants made their DOJ productions to plaintiffs in April of 2015. All defendants have since made their DOJ productions to plaintiffs, and we have reviewed these productions. We served an interrogatory related to affective vehicles in May of 2015. We served comprehensive discovery in July -- June 2015. The deadlines have passed for meeting and conferring on transactional data and documents, but the parties are still negotiating

transactional data and custodian search terms because while there were a lot of common issues there were a lot of the defendant-specific issues as well and the parties are working through that together.

Again, plaintiffs have received some productions from all defendants though defendants' deadline to complete production isn't until March 2016. The parties have completed negotiations on initial discovery plan and initial orders in bearings.

Regarding depositions in bearings, and this goes for all cases after wire harness, depositions can't proceed yet because there aren't deposition protocols in any case but wire harness. We negotiated deposition protocols in fall of 2015, the Special Master heard arguments on the remaining disputes in December 2015 and he entered an order on the deposition protocol disputes that remained last week. The parties have I believe two weeks to submit objections, if any, and if there are no objections then we would submit the deposition protocols at the end of February.

So at the earliest bearings depositions and depositions in other cases beside wire harness likely won't proceed until early April given the obligatory lead time for scheduling and also the potential objections to notices of depositions. Plaintiffs expect to interview the first set of key witnesses in bearings in late March of this year.

And as to AVRP, like bearings, the Court granted the DOJ's stay in December 2013. The stay remained in effect until January 2015. The Court resolved --

THE COURT: 20 --

MS. TRAN: 2015.

THE COURT: So it is done now?

MS. TRAN: Yes. The Court resolved motions to dismiss in May of 2015. That same month plaintiff served an interrogatory on AVRP defendants, we also served comprehensive discovery on these defendants in July -- in June of 2015.

As to documents in AVRP, the defendants have made their DOJ productions to plaintiffs. We finished reviewing these. Regarding the comprehensive interrogatories we served, the defendants sought a three-month extension to respond to them and plaintiffs agreed to that. We are still discussing transactional data, discovery plans, initial orders, custodian search terms all at once with these defendants, and depositions for the same reasons as bearings, AVRP depositions haven't started yet but we have interviewed key witnesses.

THE COURT: Okay.

MS. TRAN: Also I would like to give the Court a brief update on non-party discovery which is relevant to all cases.

The Court instructed the parties to coordinate non-party discovery in January 2015. The parties agreed on a uniform subpoena to OEMs in April of 2015 after collaborating diligently on them and receiving a few extensions from the Special Master to do so. In light of the direct purchaser plaintiffs in Ford's objections, the same parties could not serve the OEM subpoenas until the Special Master ruled on the objections in June 2015, so the serving parties served these subpoenas in July.

The vast majority of OEMs haven't responded to the subpoenas despite months of negotiations including a summit in October and also proposed compromises on behalf of the serving parties.

THE COURT: The summit is the OEMs group, is that right?

MS. TRAN: It was plaintiffs, defendants and OEMs, yes. So last month the parties realized that they reached an impasse with the OEMs and we prepared for motion practice on the OEMs' subpoenas. We filed the motion to compel the subpoenas last night. My colleague, Mr. Williams, will address non-party discovery in detail during the motion argument later.

I'm happy to answer any questions that the Court may have on wire harness, bearings, AVRP discovery. I'm also happy to discuss discovery in the other cases if the Court

wants me to do so.

THE COURT: Well, what I am concerned about is that discovery for the three parts be completed and we will be talking about that obviously in the motions, but I was going to get into this in just a minute but I'm going to get into it now. I was very concerned, very concerned, as I read the motions that we have on discovery because of what I sense, and I would hope this isn't true but it obviously has to be, is that there is a growing sense of acrimony amongst the attorneys. I mean, I never sensed that when you were here ever. You all are so professional and you all seem to get along, but I'm concerned about this divisiveness that's coming up. I'm concerned about -- I'm going to take something that isn't true but this is the general nature of the argument. Oh, you're one day late in filing this and I'm not giving it to you anymore, or, you know, you asked two people and you should have only asked one. It is -- there is a lot of pettiness. I mean, it brings me back to my days in state court in divorce court because that's just what it sounds like, and I thought, oh, my gosh, how can this be happening?

So those of you that come up to address the motion you can address this issue. I'm concerned, and I want to know if there is something that I can do to alleviate that. Is there a process -- is there something innovative that we

haven't even thought about with all of the brainpower in here as to how we can handle this massive litigation -- the discovery in this massive litigation? Really that's what I'm looking for.

I am very pleased with what I have seen so far of the Master -- well, he's going to give his own report, but what I have seen, I mean, I haven't had that many things come to me and maybe that's why I didn't know this was growing, and then all of a sudden I get these motions and strike this from the record, strike that from the record. We don't need that, we don't need that. We are all professionals and we can get around this. I don't like it, and we will see how it goes, but it is not going to continue. Okay. All right.

MR. CHERRY: Your Honor, may I speak?

THE COURT: Yes, Mr. Cherry.

MR. CHERRY: Ms. Tran reported on the status of the discovery from the plaintiffs' side, just to give the defendants' side. Just to report in the wire harness case the defendants are on schedule pursuant to the scheduling order. We produced what was required to be produced by September 1st, which was for key custodians. My understanding is we are all on schedule to meet the February 1st deadline for the remainder of the discovery. We have produced transactional data, most of us quite some time ago, and have exchanged in a number of fairly long

correspondence responding to questions about transactional data informally to try to accommodate the use of that data.

Defendants have also -- are very far along in taking depositions of the plaintiffs. At this point we have deposed I believe 42 of 52 roughly of the EPPs. There are a couple scheduled for the next week or two. I think for the direct purchasers we have deposed four and there are two more scheduled in the next two weeks, and I think the last one may be contemplating dismissal. So we are very far along on that.

We are not nearly as far along in taking the auto dealers depositions, that I think is an area where Your Honor may be referring to, there has been a fair amount of motion practice, but I think the main thing there is we do have a motion -- an objection to one of the Special Master's rulings about the topics in the notice for the 30(b)(6) depositions of the auto dealer plaintiffs, that's been briefed -- is still being briefed but on an expedited schedule so that we can get those depositions going quickly, and that will --

THE COURT: When would that be filed?

MR. CHERRY: That will be completed on the 29th of this month at the latest, so we would ask if Your Honor can rule on that quickly and then we can start taking those depositions?

THE COURT: Are you asking for oral argument on

that?

MR. CHERRY: I don't think so, Your Honor, just a ruling on the briefs.

THE COURT: Okay.

MR. CHERRY: Thank you very much.

THE COURT: All right. I know the Master has handled a lot of motions and I'm pleased these are going very timely, so I think if there is any delay it is here because it takes us longer to get to them but it appears that Mr. Esshaki is right on top of it.

MR. CHERRY: Yes, he's been very responsive, Your Honor. There is one thing and maybe we should raise it with Master Esshaki, as we are getting into all of these depositions it may come that we need sort of to do things by telephone and get sort of informal rulings as we get very busy with depositions, and we assume that that would be within the rules that we --

MASTER ESSHAKI: Just give me a call, drop me an e-mail.

MR. CHERRY: Thank you. Did you want some briefing on the cases that follow these initial three?

THE COURT: Well, you can tell me something about them.

MR. CHERRY: Well --

THE COURT: I'm so anxious to get these three done.

MR. CHERRY: I mean, they are basically the next set of I guess what the plaintiffs have referred to as these tranche one cases which really are the next four or five. Discovery was served over a year ago, we responded to discovery. There have been a number of meet and confers. All the initial orders are in place. We are contemplating beginning production within the next week or so, I had hoped to start before today, but those are sort of fairly well along and moving forward.

Then there is really another group of cases where there has been rulings on motions to dismiss, there have been answers filed, and those are really ready for a Rule 26(f) conference so they can begin discovery. And then after that there is really a fourth group where we are really waiting a schedule for motions to dismiss or answers, and those are the more-recently-filed cases.

THE COURT: Okay.

MR. CHERRY: Thank you, Your Honor.

THE COURT: Good, good. Be sure to let me know if there is something that needs to be done from our end and how quickly it needs to be done as these things, I don't know what they are, but if and when they come up I'd like advance notice. If you will feel that you just want to send a memo to the Court, I know then you have to notify everybody, but if you just let us know because it is difficult to get you in

a timely manner, I want to do it timely, but it is difficult, I'm trying to reschedule things so the MDL has considerable priority.

MR. CHERRY: Yes. I mean, we should probably talk to the plaintiffs about particularly those latter filed cases and a schedule for that.

One thing the plaintiff -- or the defendants contemplate filing, when we were before you at the last status conference there was a discussion of a discovery and scheduling order to formalize for the tranche one cases. In fact, that plaintiffs filed that with Your Honor, and it was mentioned at the last status conference that the parties were discussing that and trying to resolve what were fairly narrow disputes at this point.

We have had some other discussions since then that's broken down because of the approach the plaintiffs are taking now with this motion to consolidate and amend, but the defendants plan to file a motion to enter basically the order that they had proposed with the modifications that we have discussed with the plaintiffs.

THE COURT: Okay.

MR. CHERRY: Thank you.

MR. WILLIAMS: Your Honor, Steve Williams for the end payors.

I just want to respond briefly to the last comments

by Mr. Cherry as it is not before the Court now, there is nothing for the Court to do now. It is correct to say we have a motion pending, we are not presuming it will be granted but if it is there is no reason to have separate orders entered in those cases. There is no time urgency to those cases at present given the cases that are before them which are progressing in many, many ways. The most important part of those latter cases is really the OEM discovery which we are doing now for all cases, so it would seem to us that they ought to talk to us before they file a motion, they have not talked to us yet, and we should address whether or not it is an appropriate time to do this now or wait until March 9th when we have a sense.

THE COURT: I'm sure, Mr. Cherry, you will talk to them before you file a motion because it is required under our rules, right?

MR. CHERRY: Yes, Your Honor. We have had maybe four or five calls about this. We have exchanged drafts. It all started frankly with Mr. Williams' filing with the Court and proposal to us, we met and conferred a number of times about this, I thought we were very close to an agreement, and then discussions stopped and they went a different way. We are -- certainly we reached out to Mr. Williams to see if he would like to have another sort of last discussion before we filed, but we have talked about this a fair amount.

MR. WILLIAMS: I would say, Your Honor, we talked about it, if my memory is correct, in 2014.

MR. CHERRY: Your Honor, no, Your Honor.

MR. WILLIAMS: The last time --

THE COURT: No, I'm not getting into this, uh-uh, you call them up before you file your motion and discuss it.

MR. CHERRY: We will, Your Honor.

MR. WILLIAMS: Thank you.

THE COURT: In 2016.

MR. CHERRY: Yes, Your Honor.

MR. REISS: Good morning, Your Honor, again. Will Reiss for the end payor plaintiffs.

I'm going to give you just a very brief comparatively discussion about the status of the end payor plaintiffs discovery to date. We have 55 class representatives across the various cases. I think, as Your Honor knows, these are folks who purchased or leased automobiles. In the various cases defendants have served us with discovery requests essentially asking for all documents in connection with our class members' purchases. We have been diligent to try to produce those. They have asked for documents beginning in 1996 going all the way to the present, so you can imagine that's a 20-year period. To the extent our class representatives have those documents, we have produced everything that we are aware of. We have told them

that we reserve the right to supplement but we've done everything we can and we feel we have substantially produced everything now. As Mr. Cherry indicated, the vast majority of our class reps have been deposed. To the extent that we don't have documents for specific purchases, we have provided information to the defendants so they can go ahead and subpoena the dealers that sold those automobiles. So we feel we are in a position that we have complied with everything, we have produced these documents across all the cases pursuant to the MDL.

THE COURT: Okay.

MR. ROZGA: Good morning, Your Honor. Kajetan Rozga for Bridgestone in the AVRP case. I just wanted to briefly add a few details to Ms. Tran's summary of stats in the AVRP discovery.

Defendants are proactively trying to move discovery along and produce documents in a timely fashion. Regarding the transactional data, most of the defendants have now produced transactional data in some form to plaintiffs. As for interrogatories, the substantive interrogatories were served on us and following the extension all of the AVRP defendants submitted detailed substantive responses to those interrogatories, and we are -- that was actually in October 2015, and we are still anxiously awaiting the opportunity to move forward and discuss those objections. To

the extent that we objected to some of the requests we have not heard from plaintiffs yet on that, but we are ready to do that as soon as you are.

THE COURT: Who do you represent again?

MR. ROZGA: Bridgestone in the AVRP case.

THE COURT: Thank you.

MR. AMATO: Good morning, Your Honor, Jeffery Amato for the NTN defendants in the bearings case.

I just wanted to add to the end payor counsel's description of discovery, which was largely accurate, that the case is moving along. We have cooperated in discovery. We have produced transactional data. We are beginning the production of substantive documents, and we are hopeful to conclude negotiations on search terms and methodologies.

One thing I would like to add is that to the extent that the plaintiffs would like to start taking depositions while the protocols are being negotiated or litigation is still pending on that, we would be open to those discussions so that the depositions can start. And if any other bearings defendants want to add I welcome that.

MS. KAFELE: Heather Kafele on behalf of the JT defendant. We are also in the bearing case.

I would just add in addition to what Jeff just mentioned, the defendants in the bearings, we have actually substantively responded to the interrogatories, so we have

given a lot of information in quite detail, that in addition to the documents I think well suits the plaintiffs to start the depositions, so we are moving very fast in our case, we haven't had as much lead time as in wire harness but we are on track to meet the deadlines.

THE COURT: Good, good to hear. I have a question. What do plaintiffs -- well, defendants too, what do you do with all the documents you get, not the electronic stuff, but do you have a warehouse, I mean, or is somebody's office filled to the ceiling? I'm just curious.

MR. WILLIAMS: Steve Williams for end payors. I will try to answer it.

I would say the overwhelming majority of the documents are all electronic, not paper. They are hosted through vendors. Some firms, not our group, have in-house but hosted through vendors and make them available to reviewers around the country and sometimes around the world, they do their work remotely on computers looking at the documents and all of the work they do is then reflected in the database that shows the attorney work product analysis of those documents.

THE COURT: So we are lucky we are into the electronic age or this case would really be a nightmare.

MR. WILLIAMS: It is a blessing and a curse.

THE COURT: Okay. Thank you.

The next status conference is set for May 11th, that's still on, everybody knows that, right, at 10:00? The suggested date I have for the next conference will be September 14th. Do you want to check calendars and see if there is something that's up for September 14th?
Mr. Williams? Okay.

MR. WILLIAMS: It seems good on the plaintiffs' side, Your Honor.

THE COURT: Defendants have anything? All right. Let's schedule it then for September 14th at 10:00. All right.

Other matters? First, I would like the -- before we get to the other matters, I would like the Master to give a report. I know it is not specifically on the agenda but I would like him to do that.

MASTER ESSHAKI: Thank you, Your Honor.

Good morning, everyone. It is a pleasure to see you here in Detroit. You brought the president with you, that's really a compliment to our great city.

I wanted to address two significant issues today. First, I want to pick up on a thread that the Judge discussed a moment ago, and that is I also am feeling and sensing a raising of the temperature in the advocacy that's going on in this case. I have complimented all of the parties since I have became involved for the professionalism, for the

cordiality, and for the manner in which they have dealt with each other, and then approximately 60 to 90 days ago I kind of felt a shift.

I just want to suggest to you what was suggested to me when I was a very young lawyer by a very fine trial judge who said there is a very fine line between zealous advocacy and acrimony and you have to guard against crossing that line.

Additionally, I would like you to keep in mind that what you say to me in a telephone conference or what you say to me in an e-mail is significantly different than what you say in a pleading because a pleading today is going to be part of the Court's permanent record and because of our new electronic storage it is going to be available to be reviewed by anybody at any time, so you need to guard against being acrimonious or personal attacks against opposing counsel because it's going to stay there. And if you, for example, ask for sanctions for unprofessional conduct, do you really want that if you are the opposing counsel sitting in that record for the next ten years to come? So just be cognizant of that, that it is a fine line, and I think we are starting to push up against that line and maybe in fact some cases crossing it.

So I was thinking what can I do to lower the temperature? And my procedure has been in those instances

where the parties have asked me to discuss a case or a motion in advance, to make myself available and to have that discussion. We have had, for example, in the protocol discussion we had lengthy discussions as I recall just before the holidays and we worked out a lot of those issues, some of them I had to make a call and I made the call, but sometimes I just make a ruling. And I decided that in order to -- in an attempt to lower the temperature I'm going to sort of insist that we have a conference call immediately after the motion reply is filed, and my office will arrange it, you just agree to participate in, and we will see if we can't resolve some of the disputes in that call that are involved in the pending motion so, one, they don't reach the Court, and two, we can have a mutual understanding and perhaps agreement on how we resolve matters, and if in the end we can't resolve it then maybe we have limited -- instead of five issues that would come to the Court maybe we have limited it to one or two, so I'm going to start to implement that immediately.

The next thing is we are going to now be opening up the case to other parts, and I would like to advise counsel who have not been involved in working with me on what the process is that we follow in addressing discovery-style motions -- predominately discovery-style motions. I looked at my files and I think within the last 12 to 14 months I

have addressed by my count 43 motions. What happens is a motion is filed with the Court, I ask that you send a copy to me if it is a discovery-style motion. The Court assesses the motion and makes a determination whether it should be referred to me. They then enter a reference order or an e-mail that they send me referring the matter to me. Then a response is filed, and a reply is filed, and an order is entered.

I would say the majority of the time we have conference calls but a lot of times the issues are relatively clear-cut, the positions of the parties are so entrenched that it is a waste of time to pick up the phone and call, and I just need to make a ruling and issue that order. Keep that in mind. You file your motion with the Court, send a courtesy copy to my office, the Court will then send an order of reference to me, the response is filed, the reply is filed, and I will now insert a conference call where I can chat with the parties and see if we can't resolve some of the issues with respect to the motion, and then if there's still issues that need to be resolved I will issue an order which, as you know, will then be subject to objections to file with the Court.

But from my standpoint, I have been following the procedure that I do not delay, I think you are all aware of this by now. The motion is filed, the response is filed, the

reply is filed, and generally within 24 to 48 hours after the reply is filed you have my ruling, so I am doing my best to stay on top of these things. I can't help the substance, I'm going to make calls that go in your favor sometimes, that go against you sometimes, I'm going to make calls that are right and I'm going to make calls that are wrong, that's why we have an objection process. Please don't feel the least bit hesitant, I have very thick skin, of filing objections, I just don't need to sit here when you argue them. So as I said to one of your fellow attorneys, if I need to hear criticism of my conduct I can always go home.

So we will try to work on getting back into a very cordial relationship and trying to voluntarily resolve some of these disputes before they hit the front burner with the Judge. Thank you, Judge. I'm all set.

THE COURT: Okay. Does anybody have any questions for the Magistrate -- for the Magistrate Judge?

MASTER ESSHAKI: I just got a promotion.

THE COURT: Or a demotion, I don't know. Any questions for the Master? Okay. All right.

MASTER ESSHAKI: Thank you, Judge.

THE COURT: Thank you. I love your raising of the temperature. I haven't thought of it that way. I will use that.

MASTER ESSHAKI: Good to see you, Judge.

THE COURT: Thank you.

Before we go into our motion hearing, Rob has had surgery on his knee, so let's take a ten-minute break and then we will start with the motions. Thank you.

THE LAW CLERK: All rise. Court is now in recess.

(At 10:45 a.m. court recessed.)

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(At 11:00 a.m. Court reconvenes, Court, counsel and all parties present.)

THE LAW CLERK: All rise. Court is again in session. You may be seated.

THE COURT: While we are regathering, I do want to say I appreciate again the status reports, it is very helpful to have those every session. Thank you.

All right. The first motion we have is the end payor plaintiffs' motion to adjust the class cert schedule.

MR. WILLIAMS: Hello, again, Your Honor. Steve Williams for the end payors.

I believe some other plaintiffs join in this, they may speak for themselves, but I think this relates as well at least to the auto dealers and the truck and equipment dealers.

THE COURT: Okay.

MR. WILLIAMS: I would like to, if I may begin

by --

THE COURT: The auto dealers filed a concurrence, is that what you are referring to?

MR. WILLIAMS: Correct. If I may, I would like to respond to the comment that the Court made this morning.

THE COURT: Okay.

MR. WILLIAMS: It relates to this motion as well. What I would like to say is in this room are some of the finest attorneys in the country, on this side and on this side, and given the complexity --

THE COURT: We have to wait for Mr. Iwrey to come in because he wants to be amongst those.

MR. WILLIAMS: I think he just wanted to be specifically called out.

And given the complexity of this case, which no one in this court can doubt, and the number of parties, what I would like to impress upon the Court is how well we have, in fact, worked together. And the primary issue for the end payors that underlies the motion to continue the schedules concerns the discovery of the OEMs, the non-parties, and that's an effort that is set forth in our brief, particularly in the reply brief, and by declarations. The end payors, the auto dealers, the truck dealers, the State of Indiana, the State of Florida, the public-entity plaintiffs when they were there, and all the defense counsel all worked together to

do -- to draft the subpoena, to serve it on parties, to meet and confer with those parties, to proceed with those discussions even when we hit the roadblocks when they formed into this group to fight us, we did that all together in a cooperative way that I have never experienced in a case before. It is unprecedented, and it was the right thing to do in this case. I don't think anyone could ever suggest that it was the wrong idea to minimize the burden to the non-parties and to create the consequence that the later cases are going to catch up to the early cases in this regard.

Ms. Tran alluded to the motion to compel that was filed yesterday. That was done jointly with defense counsel. We all drafted together a brief that we could all sign and even though they might put a different perspective on certain issues than we might, we worked on that and did all of that together. And the reason for this preface is I do want to assure the Court that I think, and I think most of the attorneys here would say, we have done very well, we are all zealous advocates for our clients, but we have done very well in managing this case and in maintaining the appropriate level of professionalism and courtesy that the Court deserves and that all of our clients deserve and that we deserve.

THE COURT: I did note, Mr. Williams, in terms of the discovery and you joining together, all of you, to get it

from the OEMs, I think that's amazing, I did notice that and I wanted to congratulate you on that. I do think you have worked together, I don't want you to take it like I think you haven't, you have been amazing, that's why this bothers me even more because I just never even expected it, but things happen and we will get through it.

MR. WILLIAMS: And what I have pledged to Your Honor for our group and I think for really everyone here is we will maintain that, we will recognize our duties to each other and to the Court.

And when we talk about the joint effort on these subpoenas, if it was just us, if there were just end payors, we could have proceeded with not coordinating with anyone and we would probably be far ahead. Those requests that were in that subpoena that we didn't want, that the defendants wanted, but we were working collaboratively. Did doing that slow the process down? Of course it did. Did efforts on both sides, us to canvass the plaintiffs and the defendants to talk to each other to reach agreement slow thing downs? Of course it did. And I don't think the standard for this Court on this motion is to put forth a bunch of anecdotal evidence and give you e-mails and say look at this, Williams didn't answer this e-mail for three days after I sent it, because I can do that for them but that to me is not really the point.

We are asking here for a relatively modest extension that in a class action case -- not this class action, not this complex class action case with three separate classes, Ford Motor Company part of this who is involved, Indiana and Florida involved, and other ones, an initial extension of a class cert deadline is routinely granted, it is typically not disputed. It is disputed here so we should look at the reasons and whether or not the Court should grant the extension because we satisfy Rule 16, it serves the interest of justice and fundamentally the argument that those three classes should be deprived of the ability to go forward because somehow it is all the end payors' fault that this discovery wasn't done sooner, there is no merit to that.

So when we came to the Court in June of I think 2014 I believe end payors and I think I was the first one that raised with the Court that we need to do this non-party discovery, and what the Court said is we are not there yet. The defendants could have been serving the discovery on their own, they didn't need to wait for us, we didn't hold them up. We didn't do anything that ever stopped them from serving it on their own if they wanted to, but they have agreed, we have all agreed, and the Court has endorsed the idea of trying to minimize the burden to the non-parties and trying to create a benefit to all of these cases.

So I think that was the right decision. Anyone in hindsight can look back and say well, if you didn't do that you might have been ahead, and frankly they don't know that. First of all, we needed some information before we could intelligently draft subpoenas to non-parties, it wasn't just the DOJ productions, that wasn't going to give us the sufficient basis to know who to serve the OEM subpoenas on, to know what information we needed, to know what models were involved, to know what parts were involved, we didn't have that early. So it is simply speculation to say if you had started this in 2013 or 2014 you would have it all by now, we don't know that, but that's not even really the right standard.

We didn't have a scheduling order for wire harness until February of 2015. We were already working on those subpoenas with the defendants at that time. We didn't have a scheduling order for AVRP and bearings until September of 2015. We had already served and we were meeting and conferring with the OEMs about the discovery at that time.

The information that we are seeking in these subpoenas the defendants agree, it is necessary to us. They are not saying we can go forward without it, they are saying you should not be permitted to try to certify your classes. That's not the right result here. Four months in the scheme of this case is a relatively modest extension, and maybe they

will say something different today but in their papers they say prejudice but they have not substantiated it. They are going to have to keep litigating, they will have to keep doing discovery, they will have to oppose a class certification motion or not so --

THE COURT: Let me ask you a question. On the dates that you suggest moving forward, it is basically the four months in each of them, right, that you are asking to extend it?

MR. WILLIAMS: Yes, Your Honor.

THE COURT: And my question is do you believe that you can, in fact, meet your extended deadlines or is this just are we looking at this is what we hope to do and then we may have another extension, because I can tell you how many people ask me how my case ended. Has it ended, you know, no way. So there is certainly interest in resolving this case but I agree four months is not such a long time, but I would like to know how firm is that four-month date?

MR. WILLIAMS: And I'm glad you asked. That was the shortest period that we thought we could live with with the premise being our motion to compel is filed, that speaking for the plaintiffs' side and we will talk with the defendants, we are not going to do an extended briefing schedule with the OEMs, we want this in front of the Master as soon as possible. And we just filed our papers last

night, you will see if you read them, they are with Master Esshaki right now, what I have proposed for the end payors is I think there should be a date set for a hearing, we spend the morning with the Master, the OEMs, all parties, mediate what we can resolve, we spend the afternoon with a hearing and get rulings because Master Esshaki moves very, very quickly and there is a short time frame to respond.

The motion prioritizes the production of the transactional data with non-transactional data, I'm referring to OEM productions, coming later, that's the key for all of us. We need action from the Court to keep the schedule in place. I think Master Esshaki is perfectly suited to do that. So provided we can keep that schedule and that the OEMs are not given two months to answer then I think we can provided we are more diligent in not giving extensions.

And frankly, Your Honor, you know, we have given defendants -- we heard about the three-month extension to answer interrogatories in AVRP, we do those things, and when we started this process with the OEMs before they formed into this collective to fight us we granted them extensions because that's a reasonable thing for an attorney to do, it is in accordance with the rules that govern attorneys in this court, but that burned us because we didn't get anywhere after we granted those extensions, and now we are in a position where I can say the OEM's position has been you're

not getting one thing from us without a court order. I didn't anticipate -- I should say there's a few, two or three, who didn't join the group who produced, but for the key OEMs across the board their position right now is you are not getting a thing from us without an order so we know what we have to do; we need an order from Master Esshaki, we will need an order from Your Honor, so we will be looking to the Court --

THE COURT: Is that we are not going to cooperate or it is just that we want to deal under court orders to protect ourself, whatever?

MR. WILLIAMS: As I interpret the positions and as set forth in the motion we filed yesterday, the first position, until you agree ahead of time that you will pay every penny we spend to respond we won't do anything, that's not the law, that's in our brief and you will see -- in our joint brief, you will see arguments on that, they are wrong.

Two, the other things they have offered to give us, even if we were to agree ahead of time to pay them everything, are just two small categories subject to negotiations to be held at some point in the future. They agree they will give us some information about their manufacturer-suggested retail prices, which frankly we could probably go on the Internet and find that out, and they give us some information about non-defendant documents. As to

everything else, their position is get it from the defendants, get it from public sources, don't bother us. So it is as stark as I'm presenting.

THE COURT: Okay.

MR. WILLIAMS: I think I have covered most of the points I wanted to with just one or two that I would like to briefly mention, which is I mentioned in the papers I don't think they have stated any cognizable prejudice to them, they are going to continue litigating the case. I think they are really seeking the windfall of preventing these classes from having an opportunity to be certified. We would prefer not to have made this motion. And I didn't mean to be flippant in saying if it was just us and we didn't have to coordinate with anyone we would have just served it, we would be farther along, but we did have to coordinate because we're in the centralized MDL proceeding. We don't have the ability to simply act unilaterally, I don't think that's what the Court wants, I don't think that's what serves the parties. We don't take scheduling orders lightly.

If you look at the cases that are cited, and I don't think you need to look at defendants' cases, they cite a case -- a medical malpractice case, a non-published 6th Circuit case where somebody sent in an expert report nine months after it was due. That's not the case. That has nothing to do with this case. Nor is this some tactical

effort to stall or to somehow have the motion to consolidate rulings, it has nothing to do with this, these cases aren't part of that and we are not seeking a stall. We have as much interest, if not more, in getting to the class certification date because all the risk is on our side until we get there.

THE COURT: Okay.

MR. WILLIAMS: Thank you, Your Honor.

MR. RAITER: Your Honor, Shawn Raiter on behalf of the auto dealers.

You are correct, we concur and join in the end payors' motion.

THE COURT: Okay. Thank you.

MR. KESSLER: Jeffery Kessler representing NTN in the bearings case, and I'm going to speak for the bearings defendants and also the AVRP defendants as well. Mr. Cherry will separately speak for the wire harness defendants on this motion.

Let me start out, Your Honor, by saying that we welcome the Court's comments about the need for all the parties here to work together. This is a unique matter, a unique MDL, that has been put before the Court, and if all the parties are not rowing together in the same direction we are never going to get this ship across the water. We appreciate the Court's efforts, the Special Master's efforts and both sides' efforts in working to do that.

So Your Honor might then say, Mr. Kessler, okay, why don't you just agree to their four months? Be a good guy. You know, in the spirit of civility that's not such a long period of time. Let me try to articulate what is the defendants' concern because we have thought very carefully about this.

Our first objective here, and I know it is the Court's objective, is to make sure that everything that can be done is done to try to get these class certification motions decided within five years of when this matter started. That's hardly an ambitious objective. We are not in a normal case. Mr. Williams, for example, mentioned how the parties readily agreed to a few months' extension in the capacitors case. The capacitors case was filed in July -- the first complaint in July of 2014, and with the extension readily agreed to there will be class certification rulings in less than two years from the first complaint, not the consolidated complaints. I'm not criticizing anyone, we have a different situation, a different set of parameters, but we think it is imperative to make sure we are doing everything we can.

So our first problem with the request is we think it is premature. Why do we think this request is premature? We are not trying to deprive them of the ability to do what they want to do to certify their class, I want to say that,

but we think the request is premature. First of all, they have made a statement that they ideally, I think is the word that was used in Mr. Williams' affidavit, their experts would like six months to study the data. I start out with the fact that they didn't put in any expert declaration, all we have is the declaration of Mr. Williams, and in all due respect our experts looked at it and said they don't understand why it takes six months to be able to be in a position to utilize this piece of the data.

The defendants' data, which is the main data that they are going to be utilizing first, is already long available in terms of that, so we don't really have an understanding of where the six-month number comes from, but even if you assume it is six months, well, if the data is produced let's say now that the motion to compel has been filed, let's say it is produced within 60 days from now, well, then their four-month request isn't necessary because even using the six-month period of time you wouldn't need four months for them to have six months of that time.

So I think until we know how long it is going to take to resolve the OEM issue, and until we get an actual record as to how long it really takes to utilize that data, we would be happy to put in expert materials on this if they put in expert materials, I don't think we are in a position for the Court to say there is good cause for this delay

which, of course, is the standard, we all agree on the standard. And we share the Court's concern that if there is going to be an extension at some point in the extension there should only be one request ever made for an extension. I can tell you the defense side will never make a request for an extension in the class action schedule, okay, so we think there should only be one request.

We are not in the position yet to consider that, and since the class certification deadline is still very far off, we are talking now, remember, the summer of this year before they have to do anything, we would suggest that this issue be revisited only if it is necessary, okay, at the next status conference where we can decide whether or not there has to be any extension or not. And I think that discipline, that internal discipline for the parties, for the Court, will give us a better chance of getting to that finish line as soon as we possibly could get. So that's our first concern about just saying yes, well, it is just four months, why don't we agree to it. We don't know if that's the right number. We think it is probably too much, and we don't really know it is needed in terms going forward.

But my second point, Your Honor, is that -- and in the spirit of avoiding acrimony, I don't want to revisit the issue of diligence even though that's one of the standards here, but the reality is that this issue of OEM discovery has

been known to the plaintiffs since they filed their cases in 2011, and while Mr. Williams says that he wanted the information to tailor the responses, which is why he couldn't do it for so many years, the fact is there has been no tailoring. The plaintiffs' theory of the case from day one has been that all the automakers are affected regardless of what's in the pleas, regardless of what's in the defendants' documents, regardless of any of our interrogatory answers, so that, in fact, they are seeking OEM discovery from numerous companies who are not mentioned in a single document, in a single plea, in a single case. So there has been no tailoring, there was no need to wait for this tailoring because they haven't done any tailoring for that. Perhaps, by the way, the OEMs may say something about that in their opposition, I don't know. The point here is this argument could have been teed up, Your Honor, a very, very long time ago.

Now, I heard Mr. Williams fairly say well, defendants didn't tee it up a long time ago but defendants' position is this is plenty of time, so we had no reason to tee this up some long time ago. This information is information plaintiffs deemed to be critical, and I don't begrudge them that, but it should have been pursued. There was no stay in place. Certainly the Court's comments, and I was here when the Court made her comments back in June of

2014, I don't think it was meant to preclude the plaintiffs from going forward with their third-party discovery when the Court said we are not up to that yet. Your Honor knows far better than I do what the Court meant. I did not interpret the Court's comment being an admonition not to pursue discovery at that point.

So the point here is I don't think we are at a record point at this moment where this request should be granted. And, you know, I looked at what the 6th Circuit said about this and the 6th Circuit was talking about why courts don't readily grant extensions to their orders, and they spoke about the fact it would undermine -- I'm quoting the 6th Circuit in Smith vs. Holston Medical Group, it would undermine the Court's ability to control its docket. Okay. There is no more important concern from the MDL here than the Court's ability to control its docket, and it would disrupt the agreed-upon course of the litigation. We agreed upon this course, Your Honor, just at the last status conference, and now we are one status conference removed already and now suddenly there is a request for a four-month delay even though plaintiffs acknowledged at the last status conference they thought that they could meet the schedule. In fact, the original wire harness schedule was stipulated and put in for Your Honor before we joined on and our schedule follows a few months before.

So, Your Honor, I would love to just say yes but I don't think it is in the interest of this Court, I don't think it is in the interest of this docket, so instead I would say please defer, let's hold this off, let's see how the OEM discovery goes, let's see how all the other discovery goes, we are going to try to do this as fast as possible, maybe we can find ways to facilitate the use of the data when it comes out, we don't know what it is going to look like, we don't know if it is going to be complicated or not complicated, we just don't know until we get there, and then in May we can have a discussion with the parties beforehand, perhaps we will agree upon a short extension, perhaps we will agree it is not necessary, but at this moment we would say please defer, Your Honor. Thank you.

THE COURT: Okay. Response?

MR. WILLIAMS: Can I respond to Mr. Kessler and then --

MR. CHERRY: Sure.

MR. WILLIAMS: Is that okay with Your Honor?

THE COURT: Yes.

MR. WILLIAMS: Thank you. Just I want to briefly respond to Mr. Kessler's arguments while they are fresh.

First, the five years of when it started, that's -- I'm sorry, Mr. Kessler said well, we think the case should be resolved within five years from when it started. It is just

an arbitrary date. He's talking about the first complaint that was filed before the MDL sent it here, before leadership was appointed, before complaints were filed, and frankly he's talking about bearings and AVRP, those motions to dismiss weren't decided I think until 2014 and 2015 and stays were in place until 2015, stays even as to their DOJ productions, which they didn't produce to us until April of this year. So pointing to 2011 saying five years, it doesn't have a rational relationship, but more importantly I think the idea of deferring this is the worst possible idea.

So, first of all, I looked at the standards too and one of the standards is we are required to bring this to the Court at the first time we believe there is an issue in adhering to the schedule, and that's what we did. I don't think it is the appropriate standard to say we think we are going to have a problem but let's just wait and see how it pans out and then I will bring it up in May at that time.

The argument was made, well, the motion to compel is filed so maybe we will have the data 60 days from now. We will not have an order at best until 45 days from now, and I'm fairly confident that whatever side comes out on the other side of the order is going to bring it to Your Honor so there's not going to be a final order in all likelihood for 60 days, much less a production of documents.

In terms of the argument about if you do grant it

that should be the last one, I think you have to wait to see what happens. We don't want to ask for another one but we are just making the request --

THE COURT: You are waiting on specifically the OEMs' information, is that what you are --

MR. WILLIAMS: Yes.

THE COURT: The basic thing? And we know there is a motion filed on that.

MR. WILLIAMS: For purposes of this motion and the main reason why we are seeking the extension is for us, for the indirect purchasers and the end payors, we need to see what happens after the OEMs buy the parts from defendants, build a car and sell it to our clients. So having the defendants' transactional data is only part one. As Your Honor ruled in the motion to dismiss order, we then have to show that the overcharge was passed through to us and we can't do that without their data. We are talking about an extraordinary amount of transactional data from the largest automakers in the world covering a period of in excess of ten years, so the idea that you will have it in 60 days and, you know, it will all work out fine, I would not be satisfying my duty of candor to the Court if I didn't get up and tell you that that's an impossibility. There is no way that in 60 days we will have data to work with.

As to the lack of an expert dec, we could have put

one in but there is no law that says you have to have an expert declaration to support this. I have done class certifications, I have worked with experts. I talked with the experts and the information in my declaration is what they tell me. Frankly, Your Honor, they like a year. I told them they could have a year. Six months is cutting pretty tight in terms of what they need to do with this huge volume of data when they get it.

So those are my responses to Mr. Kessler's arguments. Thank you.

THE COURT: All right. Mr. Cherry?

MR. PARKS: Your Honor, before we move on, could I just briefly respond as well, 30 seconds?

THE COURT: All right.

MR. PARKS: Manly Parks on behalf of the truck and equipment dealer plaintiffs.

I just briefly wanted to note there were some representations made about when these cases were filed. We are by this Court's determination part of the schedule in wire harnesses and bearings, not withstanding that our cases were filed in 2014, so we are on a much tighter schedule as a practical matter than a lot of the other parties and certainly then the representations Mr. Kessler made about the other groups. I just wanted to remind the Court of our existence in this and the fact that we really have been

sprinting to catch up in the two of the three lead cases since we've gotten involved.

THE COURT: Thank you. Mr. Cherry?

MR. CHERRY: Thank you, Your Honor. Mr. Kessler covered most of the points I would want to make, but just a couple of points.

Mr. Williams likes to -- or wants to really focus on the period in 2015 from I think the June -- or from the January status conference and our cooperation together since that point, but as we pointed out in our brief, everyone has known for a long time that this discovery was necessary, and the initial complaints in wire harness were filed way before bearings, I mean, our complaints were filed in October of 2011, and so that's four and-a-half years ago. By the time the motions are filed on the current schedule it will be almost five years, and by the time there is a ruling it will be almost six years. I'm not aware of a case that has taken nearly that long to get to a ruling on class certification, and Your Honor has multiple times commented that that's just far too long, it is taking too long.

And so the plaintiffs themselves were saying and we pointed out back in 2012 opposing discovery from us saying we are going to get that very quickly from the OEMs, so we assumed they would and they didn't. So by early 2014 the defendants were trying to push that along and reaching out to

the plaintiffs and saying let's do this together, we can cooperate and serve a subpoena on the OEMs, and we were shut down repeatedly and repeatedly.

And Mr. Williams tries to shift the blame to Your Honor to a comment that you made at the status conference in June of 2014 where we were talking about a number of things and Your Honor said that we are not there yet, and I think what Your Honor was really referring to was you didn't want to get into a lot of discovery disputes, you wanted to get a special master in place. And immediately after that conference we reached out and said well, we may not have a dispute about the subpoena, let's -- there is no reason not to be talking about it, we could reach agreement on the subpoena and have that ready to go and present it to the Special Master who was appointed a few months later in August of 2014 but, again, we were rejected in that, and so they wouldn't talk to us until January 2015 shortly before the status conference. Now, from that point we have had the process that they have described to you, but there was over a year wasted where were we were trying to push that forward.

And, by the way, when we did start talking in January of 2015 there were no disputes, there was nothing to present, we came to agreement on a subpoena without having to resolve anything. Now, there was an objection by the direct purchasers but that could have been presented back in August

or September of 2014 if we had just been talking in the meantime, which is what we were trying to do, and so there was just no reason for that delay.

And then ignoring that, which I don't think you should, but ignoring that delay, in 2015 we did start cooperating and I think we have all done our best to cooperate, but there is just a certain amount of insufficiency in that given the number of parties. I think granting an extension just feeds into that. We need the schedule to hold our feet to the fire, to hold their feet to the fire, our feet to the fire. The defendants I think recognize that we are the ones who frankly pushed for this motion to compel and said there has just been too much time wasted talking to the OEMs when they are not giving us anything, and frankly insisted on moving forward with a motion. We were able to agree on a joint brief and that's great, but we have been doing everything we can to push this process along, and I think granting an extension may not be conducive to that, that it gives more time for people to drag their feet and not be efficient in getting what we need to keep the case on schedule.

THE COURT: Okay. Thank you.

MR. WILLIAMS: May I, Your Honor?

THE COURT: Reply?

MR. WILLIAMS: A couple things first. Of course

there are other cases that have taken longer than this to get to class certification. The Air Cargo case in Eastern District of New York presided over by Judge Gleeson took more than eight years to get to class certification, and we don't want to do that here but I'm just saying --

THE COURT: No.

MR. WILLIAMS: -- it is not accurate to suggest that no case has ever had the history of this case.

In terms of what I didn't want to do, which is the finger pointing and back and forth, it is not true we shut them done. They said we want to talk to you about issuing subpoenas, we said so do we, we want to talk to all defendants; they said no, we won't, so we will just be pointing fingers. We ended up with the Court telling us and agreeing with us to do it the way we kept asking to do but that they refused. And I certainly am not trying to shift blame to Your Honor in any way whatsoever. I don't think blame needs to be shifted to anyone. I think we did the right thing here in the right way. We are not at some exaggerated long term here, we have I believe successfully put our arms around a very complicated case and made it manageable in a way, and I said this a few times but it is very true, that this process is advancing the later cases in a very, very material way as to the indirect purchaser classes, there can be no doubt about that, so no one has to

have blame put on them.

I very much disagree with the suggestion that somehow granting the extension is going to encourage us not to be diligent, we have been to this point, and I do think the relevant time period to look at is 2015, and the things that happened then, providing the subpoena to the direct purchasers in Ford, they had an opportunity to comment and they should have, but that added six weeks to the process.

So all of those things put together I don't think there can be any doubt that we have met the standard. It is the first request for an extension, it is a modest request for an extension in a case that we all know is looked at around the country as one of the most complex MDLs that are going on. And in this instance on these facts I think the only just result is to grant the extension and to put us on that timetable, to not leave us all uncertain and come back and see you in May and then tell you how we are doing and can we meet the dates when they are six weeks away.

THE COURT: Okay.

MR. WILLIAMS: Thank you.

THE COURT: The Court has reviewed this motion and obviously heard argument. I can appreciate what defendants are saying but I do still believe that with the discovery, whatever happened in the past like maybe they should have started before and did the Court stop them from doing that by

whatever comment I made, and it is interesting because you all remember the comments I made more than I remember the comments that I made, whatever I said, you can blame me, I'm a mother so I'm used to taking that, but I do think that there is a lot of legitimacy in what the moving party says. There was some question of when this discovery would start, there were the last two of the three parts that came in in the last couple of years, there is objections by the OEMs and this group formed by the OEMs to deal with this case, which probably is very smart so you can get them all in one entity, but I think that takes time, and as a realistic matter from this point forward by the time the rulings are issued in the motion to compel in the OEMs it is going to be two or three months from now, I think it is foolish or foolhardy to think it is going to be less than that, and therefore I don't think that the November 4th date is a bad date for the motion to be filed, that's a four-month extension.

I believe that it was brought to the Court's attention as soon as it could be. I don't believe the moving party here, plaintiffs, were dilatory, and I don't think the adverse party is going to be harmed. We all want to move this forward. This class cert motion is so critical, but because it is so critical I want to make sure everything is in it, not that we didn't have time to do this or we didn't have time to analyze that, so I'm going to grant the motion

for the extension, it is a four-month extension. I will grant the dates that have been put in the pleadings by the plaintiffs. They are the motions for certification in wire harness November 4th, response March 1st, reply June 29th and hearing August 31st. The bearings motion for cert is November 21st, then response March 29th, reply July 2nd, we are talking 2017, and the hearing September 25th, 2017. And for the AVRP, the motion for cert is December 12th of 2016, response December -- excuse me, April 13th, 2017, reply August 14th, 2017, the hearing October 2nd, 2017.

I hope there are no further adjournments in this, that's all of our wish certainly that there be no further adjournments, and obviously they are not going to be granted very readily.

MR. WILLIAMS: Understood, Your Honor. I only had one clarification. The reply date for the class certification reply brief in the bearings case, the proposed date was July 27th, and the Court had said July 2nd, that --

THE COURT: It is July 27th?

MR. WILLIAMS: July 27th.

THE COURT: I do have it as July 2nd, so the reply date would be July 27th, which is logical, that's the four-month extension.

MR. KESSLER: Your Honor, just a point of clarification. Does the Court also intend to move the direct

purchaser class motions to the same schedule even though they did not request that extension because you had ruled that they all should be heard together? I would like to know what the Court's view is about that.

THE COURT: I hadn't even considered it, it would be good to have them all together but --

MR. SPECTOR: I was about to ask the same question on behalf of direct purchasers. Our view is that the Court has stated that you wanted everything on the same schedule, and we are assuming that it would be but I just wanted to clarify that, Your Honor.

Eugene Spector on behalf of the direct purchasers.

THE COURT: Okay. Let's just --

MR. KESSLER: That's amenable to the defendants.

THE COURT: Let's make that official. Okay. We will do the direct also so please present an order to that effect.

MR. CHERRY: And, Your Honor, and Rush Trucks and trucks and equipment?

THE COURT: Yes. Everybody will be on that same schedule.

MR. KESSLER: Your Honor, I think it would be helpful if the Court could issue this in the form of an order following the hearing, that would be helpful to all?

THE COURT: We'll do that.

MR. KESSLER: Thank you.

THE COURT: We will do that, so this is to all the parties then, this schedule for the class cert -- well, to the parties involved here.

The next motion is regarding the September 3rd order of the magistrate judge, the objections. These I know could get very long so I'm going to limit you to 15 minutes --

MR. DONOVAN: Your Honor, I think that's plenty.

THE COURT: -- if you need that.

I have read them, and I'm going to be doing an opinion shortly on this.

MR. DONOVAN: Yes, Your Honor. Dave Donovan from Wilmer Hale representing Denso, and I think 15 minutes would be plenty.

THE COURT: Okay.

MR. DONOVAN: Let me start with a little bit of background, it is laid out in the briefs. Back almost a year ago the defendants began serving subpoenas duces tecum on the non-party auto dealers who sold or leased vehicles upon which the end payors' claims were based to get the documents, the dealer files, the other information because, as Your Honor knows, and I think the end payors suggested, at various times the end payors themselves tend to have very little in terms of documentation, especially regarding older sales but

frankly regarding almost any of the sales, so what we really needed were the documents from the auto dealers that sold or leased the cars so that we could get behind the transaction, find out how the pricing was really determined and the economics of the transaction to evaluate whether any overcharge -- if there was any overcharge and to the extent that it was passed on. That process was essentially non-controversial. We noticed these subpoenas to the end payors and the auto dealers. There were no objections by the auto dealers at all and, of course, no objections by the end payors. There were no motions to compel, there were no motions for protective order.

We worked out the objections to the extent that there were any with the non-party auto dealers, collected the documents and, in fact, with respect to the one dispute that came up from the end payors about the presence of certain confidential information about their clients in some of these documents. For example, the auto dealers would often have a copy of the end payor's driver's license or something like that, and we worked out a procedure with the end payors so we would have the third-party auto dealers, the non-party auto dealers, send the documents first to the end payors who would redact what they thought was appropriate to redact and we had an agreed-upon list of things they could redact, and forward on the documents to us with a time line and a schedule by

which all of that would happen. There were no problems with any of that.

In July of 2015 we took the next obvious logical step, which was to begin serving notices of depositions on the third party -- the non-party auto dealers who sold the cars to the end payors.

THE COURT: So no problems with the document production, it is now the depositions that --

MR. DONOVAN: Your Honor, I don't want to suggest there were no objections by some of these non-party auto dealers, there were, but we worked them all out.

THE COURT: Okay.

MR. DONOVAN: There were no motions filed by anybody. So we noticed the depositions of the first three of the non-party auto dealers at the end of July 2015, and right up on the due date for objections for those notices of depositions, those subpoenas, counsel for auto dealers came in and moved to preclude all of that discovery complaining both about the subpoenas that had been being served for the last six months as well as whether any depositions could go forward at all, and the Special Master after a hearing granted in large part the relief they sought.

There are two issues to which we noticed objections to Your Honor at the end of September. First was the Special Master's order barring all depositions -- all depositions of

the non-party auto dealers absent a special separate showing of particularized need, and second was his order barring all contact -- all further contact that defense counsel could have with non-party auto dealers including counsel for the non-party auto dealers directing that all communications that we needed to have with the non-party auto dealers had to go through counsel for the auto dealers.

Now, since the September ruling and the objections that we filed, defendants have, as has been described earlier this morning, taken the depositions of most of the end payors. There are still about 20 whose depositions have not been taken but we have taken the depositions of the bulk of them. We established what we thought we had made clear in our opposition to the auto dealers' motion for protective order, that the end payors know nothing about the auto dealers' side of any of those transactions. The end payors comes in and maybe they have a document or two, maybe they know what they paid, in many instances they don't even know what they paid, maybe they know a few of the terms of the negotiations, in general they don't, and certainly when we show them the documents we obtained from the non-party auto dealers they have no way to interpret those records, they've never seen any of them before, they obviously can't establish that they are business records, and they can shed no light on the auto dealers' decision-making process, the auto dealers'

thought process in reaching the negotiated purchase price that they reached with all the associated pieces of the transaction; the determination of the trade-in value, the extended warranties, the financing, et cetera, et cetera, et cetera.

So after we took those depositions there was another round of briefing while this appeal and while these objections were pending, another round of briefing to the Special Master. We needed to take these depositions so he told us we needed to show particularized need, so we filed another motion to show particularized need, and we got an order from the Special Master, he agreed that we showed particularized need. In fact, he ruled specifically that the information was critical information, the information from the non-party auto dealers was critical information necessary to the defense.

THE COURT: Wait a second. I'm going to slow you down there.

MR. DONOVAN: I'm sorry. I know I talk fast, but 15 minutes, you know.

THE COURT: Okay. You went before the Master to show particularized need in what -- against whom?

MR. DONOVAN: This was a motion to obtain from the Special Master an order pursuant to a September 3rd ruling that we needed to show particularized need in order to get

permission to take any of the non-party auto dealers' depositions. We asked for permission to take whichever depositions we thought we needed, but we offered a fallback and we said if you are not prepared to kind of bite that big of a chunk off the apple right now at least give us permission to take 15, and we named who the 15 were. He said you are right, you have shown that this is critical information necessary to the defense of the end payor claims, you defendants have shown that to me, so I'm going to give you permission to take those 15 depositions.

There was then another round of briefing about the scope of the 30(b)(6) notice that we could send to the these non-parties, and that was finally resolved yesterday, wasn't it? Just very recently, within the last few days. The first of these depositions is finally scheduled to take place actually tomorrow, Your Honor, in I think Providence. We have lost five months as a consequence of all of this, and that's water under the bridge, you can't fix that. We have lost the opportunity to coordinate, you know, these depositions of the end payors and the auto dealers and the cities they go to, and so somebody is going to have to go to Waterloo again, that's okay for me, I get to see my mom, she is happy, but not everybody wants to go to Fargo twice.

But perhaps more prejudicial from the process we have gone through so far and the reason why this is still a

live issue is that we have been precluded from using the information that we would have gotten from these auto dealers in the depositions of the end payors. There are still 15 or so end payors to depose. Ideally we would have taken at least some of these non-party auto dealers' depositions before we took the end payor, that way when I depose Jennifer Chase in Waterloo we would have had the benefit of the information from the auto dealer that sold or leased her her cars. We didn't, we had to go in there with what we had and we only get one deposition of Jennifer Chase, just like every other end payor, so there is still a live issue here. We don't have permission to depose the remainder of these non-party auto dealers, we need this resolved so we don't have to go through another round of motions practice before the Special Master.

THE COURT: But the Master has said that you have shown the need for these 15?

MR. DONOVAN: Right.

THE COURT: What would differ in the next 15 --

MR. DONOVAN: I don't know.

THE COURT: -- or the rest of the group in terms of critical need?

MR. DONOVAN: It shouldn't differ at all but we have to file -- he expressly said we may take no more without coming back to him with another motion for particularized

need.

And, Your Honor, what I think makes this simpler is that the Master, with all due respect, was incorrect both legally and factually in granting the initial relief he granted, both with respect to whether we have to show particularized need and with respect to the communications with these non-parties and their lawyers. I will address the first issue first and I will try to be even more brief about that. These are witnesses to the transactions upon which the end payors are basing their claims. They are the only source of information about the facts about how these transactions were priced and whether pass on occurred. The rationale for restricting discovery of absent class members is simply legally inapplicable here. The non-party auto dealers are not absent class members in the end payor case, period, full stop. That alone should have entitled us to take the depositions of the non-party auto dealers. And as the Special Master just held, the non-party auto dealers have critical information necessary to the defense by the defendants of the end payor claims.

So, number one, just as a legal matter we never should have gotten this far. Number two, even if there were something to the notion that these non-party auto dealers are members of the provisionally-certified class -- settlement class in the auto dealer case such that somehow that's

relevant to the end payor case as a matter of law, and we think it is not, one of the premises of the auto dealers' motion was undue burden. There is no undue burden on any of these third-party auto dealers, Your Honor. In fact, before the auto dealers' counsel got involved to stop the deposition of Dan Derry Motors in Waterloo back last August, counsel for Dan Derry Motors had negotiated with us the scope of the deposition, he negotiated with us a day for the deposition, a time for the deposition, a location for the deposition, he even identified who it was that would be testifying on behalf of Dan Derry Motors. He never raised an issue of burden, neither did any of the other non-party auto dealers whose deposition we noticed. They were on the way to get scheduled, they were going to produce a witness, he testified for four, five, six hours, whatever it took one day. There was no -- and in the motion that auto dealers filed to stop these from going forward there was no declaration from anybody asserting burden.

The concern they raised is equally unsubstantiated in the record. The concern the auto dealers raised was that somehow -- whether you are talking about depositions or talking about communications, somehow the fact of this deposition would disincentivize or discourage these non-party auto dealers from participating in the settlements in the auto dealer case. Even as a hypothetical matter I don't

think you can come up with a reasonable theory as to why that would be, why it is that noticing a deposition of Dan Derry Motors with respect to Jennifer Chase's claim in the end payors' case would cause Dan Derry Motors to opt out of a settlement that had been arranged for in the auto dealer case.

Nonetheless, the Special Master said that he was balancing the need to protect the non-party auto dealers from some interference with their willingness to participate in the settlements against our need for the discovery, which he's now found we have a critical need for, so even if you engage the balancing that courts apply with respect to discovery of absent class members, which we don't think is even relevant here, we think there is no basis for his finding that we hadn't met that test and the depositions would go forward.

Now, with respect to communication with these non-party auto dealers, Your Honor, let me be clear, this is just a question of logistics. We were talking since -- for almost a year we have been talking up until the Master ruled on September 3rd, we have been talking to these non-party auto dealers, principally to their lawyers, most of them have lawyers but not always when they would call us when they received a subpoena and they would say what is this, what do you really want, where do I send it, I can't find it, they

would send us something but it was incomplete, there were pages missing, I need a check for copying costs, send me your FedEx label, whatever the issue, that's the kind of stuff we were discussing with the non-party auto dealers.

When it came time to notice their depositions the conversations were very similar, again, principally with their lawyers, their own lawyers would call us and say I got your subpoena, what's this about? We would explain it to them and say okay, I can't do it the day you noticed it for, can I do it the next week, what are you looking for from this witness, nobody seems to remember this, and we would say it is 30(b)(6), we need them to look at the documents, we will send you another set if you won't. Well, I can't do it that day. Where do you want to do it, can I do it here in the showroom? That's the kind of conversations we were having.

In response to that we received a motion from the auto dealers seeking to quash all of those communications on two grounds. Number one was the argument that as a matter of the code of professional responsibility they argued any communications -- the communications we had had with counsel for Dan Derry Motors violated the New York Code of Professional Conduct because there was communication with a represented person. Well, we had spoken to his lawyer. No one from my firm spoke to anyone at Dan Derry Motors, there wouldn't have been anything wrong with that, but they hadn't.

Auto dealers' counsel knew that.

And I think, in fact, the Special Master earlier today was talking about making personal allegations and the inappropriateness of that, and I think this is the genesis of his comments this morning. There was a specific allegation that one of my colleagues had violated the New York Code of Professional Responsibility by speaking to Dan Derry's lawyer, and they went so far as to identify him by name in their brief and to even provide the website -- the link in our website where the Court or anyone else could be real sure exactly who they were talking about.

The Special Master ruled that it was an unwarranted personal attack on my colleague, and he suggested that that portion of brief be stricken from the record, although the Special Master observed that he didn't think he had the authority to do that. I understand as of this morning auto dealers' counsel have agreed or figured out a procedure to remove or I guess replace the brief that they had filed with a different brief that excises the specific identification of the attorney that they had leveled these accusations at, and we appreciate that, so it is a little late but we appreciate that.

Nonetheless, the argument is still false. There is nothing in the code of professional responsibility that prohibits counsel for defendants from speaking to a lawyer

for a non-party auto dealer and, in fact, until such time as we are advised that there is counsel in place for that non-party auto dealer with respect to the end payor case we are free to reach out to those people. In fact, to discuss logistics that's the most routine thing there is.

The second argument that auto dealers' counsel made was that the provisional approval of the settlement classes in the auto dealers' case created an attorney-client relationship with the non-party auto dealers for the depositions -- for their depositions as witness in the end payor case. There is literally no legal authority for that proposition, certainly none has been cited, we are not aware of any. At most the provisional settlements in the auto dealer's case created a limited attorney-client privilege between auto dealer counsel and non-party auto dealers with respect to those settlements. Okay. That's not what these depositions are about. These depositions had nothing to do with the settlements. These depositions were exclusively about the transactions in which the end payors purchased or leased the vehicles at issue in their case.

THE COURT: Okay.

MR. DONOVAN: Again, the Special Master applied a balancing test, and he balanced the auto dealers' interest again of concerning whether somehow these depositions were going to discourage these non-party auto dealers from

participating in these settlements, and the risk that somehow they would be persuaded to opt out of these settlements as a consequence of our communications with them against our right to speak to them and to their lawyers. There was nothing in the record to suggest really anything on their side of the balance of the argument. There was nothing in the record to suggest any of our communications had been improper, nothing in the record to suggest we had ever discussed any of these settlements in the auto dealer case with any of these non-parties, it was preposterous that we would have done that, we never did. They obviously had every opportunity to speak to these non-party auto dealers, had no evidence that we had any untoward conversation with any of them or, in fact, that we had ever discussed anything with any of them other than dates, times and places for these depositions, that's all it was.

The Supreme Court in Gulf Oil which both sides cited to Your Honor, lays out the standard. Even if the non-party auto dealers are absent class members with respect to the discovery in the end payor case and, again, they are not, but even if they were, the Court has held that any restriction on communications requires a clear record with specific findings, and there was neither a record nor findings by the Special Master to justify any restriction on our communications much less the absolute prohibition on our

communications.

So why does this matter? Why does any of this make a difference? It makes a difference because we continue to experience wasted time and delay in getting further documents from these auto dealers and now that depositions are being permitted to go forward in communicating with them to try to set dates and times and places that are convenient to the witnesses. The logistics of this are -- they are not a nightmare, okay, we have been working with auto dealers ever since September but it is just a pointless waste of time. For months we had a weekly conference call in which we would go through the status of the production from all of the 30 or 40 non-party auto dealers who had yet to produce documents pursuant to our subpoena. We would say, all right, what's the latest you heard from them, have you reached out to them, have they received the subpoena, are they raising objections, are they producing documents, do they have any questions, and they would come back a week later and say, okay, we talked to these five, we haven't reached these other six, we are playing telephone tag with them, and so we have this two- or four- or six-way conversation where we have a conversation with auto dealers, auto dealers have a conversation with the non-party auto dealer, the non-party auto dealer reports back to auto dealers, the auto dealers report back to us just to get the documents.

THE COURT: Okay. Let me go on because we have to move along. There was an issue about the -- I think Sheehy Auto Stores?

MR. DONOVAN: Sure.

THE COURT: The $50,000 it would cost for depositions -- well --

MR. DONOVAN: Your Honor, I'm not familiar. I know there was one auto dealer who said he expected to get paid but we don't have --

THE COURT: You don't have an issue with costs from the auto dealers here?

MR. DONOVAN: It would depend on what they were for and what they did, but I'm not aware of any dispute that has come to that point.

THE COURT: Okay. I just wanted to clarify that. Thank you.

MR. DONOVAN: Thank you, Your Honor.

MR. RAITER: Thank you, Your Honor. Shawn Raiter on behalf of the auto dealers.

This is a solution looking for a problem. This motion really has no legitimate basis to be here right now because what happened was they did not follow -- the defendants served discovery on absent class members, and all of the authority says you can't do that without leave of court. Huge amount of authority in our brief that says you

don't get to serve absent class member discovery because that would defeat the purpose of class actions. They went ahead and did that anyway, they did that first with the document subpoenas and we, as counsel noted, didn't get in the way of those document subpoenas because we understood that they may have some legitimate concern about having the complete deal records from these auto dealers. But then they went ahead and served -- started serving deposition notices for absent class members, these are people in our settlement classes, they are people in our punitive litigation classes, and now they are -- having responded to document requests are now being asked to sit for depositions. We lodge objections and we say by the way, Counsel, are you talking about one deposition, and they wouldn't commit to one. They said well, we can only imagine one but maybe more of these absent class members who under normal Rule 23 procedures should have to do nothing, they shouldn't have to do a darn thing in this litigation except if there is a settlement participate in the settlement because they didn't choose to do anything.

Now, we are in a unique case, we are in a unique MDL, we know that, and the uniqueness is that our absent class members also are fact witnesses as to the transaction with the end payors. Okay. So we do have an interesting dilemma here because they want the information and yet Rule 23 and the great weight of authority -- what you didn't

hear today was any case cited by counsel that there is some reason that this discovery should go forward without prior court approval, that's the key, you have to come in and tell the court and show to the court why you should be allowed to take absent class member discovery. They didn't do that. We then objected when they started sending the deposition notices, we moved for protective order, and Special Master Esshaki rightly followed the case law in this district, in this circuit, that says that you need to come here first and you need to apply for essentially the right or leave to take discovery. The defendants waited about three months after first having served these deposition notices before they took the Special Master up on his request, which is simply follow the law, follow the rules. So they are on a parallel track.

What they did was appeal his first ruling saying the case law requires you to come ask for leave and, by the way, you shouldn't be communicating with these represented automobile dealers because once they are punitive settlement classes and now there are actual settlement classes for purposes of communicating with those dealerships about this litigation, and remember this is an MDL that has an umbrella across all the top of this litigation, they must communicate through class counsel. Because they didn't do that the Special Master said, number one, your deposition subpoenas are quashed and, by the way, if you want to come ask me the

way you are supposed to using the standards you are supposed to apply I will be happy to entertain that motion, and number two, please stop communicating with these dealers and run these communications through counsel for the auto dealers. That is the motion that is before you on objection.

Now, while we heard a lot of re-argument of that motion what we didn't hear much of was an abuse of discretion or that he got the law wrong. The law that he applied was the right law. They don't like the outcome but he was well within his discretion in the outcome because he was, in fact, balancing the interest of this unique litigation, that's exactly what he did.

The other thing that you didn't hear this morning was how many additional depositions they want to take of these absent dealers. It is something in total well over 100. So they came back in to the Special Master and they made their motion and said we have a particularized need for this discovery in this litigation and they went through various things related essentially to pass-on defenses or antitrust injury defense, and they said we want to take the depositions of every absent automobile dealership that sold a vehicle to one of the end payor class representatives. They then said alternatively if you won't let us do that, please let us take 15 and they named the 15 they wanted to take, so he granted their motion for leave to take 15 depositions.

Those depositions, as counsel noted, start tomorrow. They have all been scheduled with the exception of a few that the parties agree that they are communicating about scheduling for those depositions, so the supposed administrative trouble and communication troubles have resulted in the depositions being ready to go and they will be completed by the end of February.

The documents that were requested via the subpoenas have all been produced with the exception of a few follow-ups and later-served subpoenas. And has that added a layer of communication and administration? Sure it has. We have been doing the majority of the work, the auto dealers. We have been interfacing with the dealers saying when are you going to get the documents, when can you give us, the defendants want dates, they always want dates from us, when will you have them, when will we get them, when can we get them, when are you going to call me back, when are you going to e-mail me, they do it all the time. It is burdensome but we have taken on the majority of the burden, the auto dealers have. So, again, it is a solution looking for a problem. These 15 depositions have been scheduled. The dealerships have produced the documents.

So what you have before you is simply this -- you have really two questions before you and they have kind of merged them together. You have two questions. The first is,

did the Special Master apply the appropriate law when asked to look at whether absent class members should be subject to discovery, and there is no question that he applied the correct law. Cases in this circuit -- the district court cases from this circuit, the Groth case, the Polyurethane case, the Skelaxin case, the Khaliel case, all applied the same procedure that the Special Master demanded of the defendants here.

Now, they said well, the auto dealers aren't members of the end payor class. The first testimonial subpoena they served was served in both the end payor class and the auto dealer class, the Dan Derry subpoena they served in the auto dealer case with the auto dealer caption. Now, when they realized it caused them a problem they withdrew the subpoena and served it again but only in the end payor case like, well, sorry about that, we now are only going to take these in the end payor case, but keep in mind what it is that they want here through this testimony. They want to show either that the end payor didn't receive any passed-on overcharge or they did, and they are in the middle of the pass-on defense which, guess what, that's where we reside right in the middle of it. These auto dealers are going to be asked to provide testimony that very well may be used against them by the same lawyers who are asking to communicate freely with them, to talk with their lawyers, to

gather documents. I think most lawyers in this room, it is striking to think that all of these defense lawyers could be talking to people in our class about this litigation, about pass on, about testifying about things that will very well be used against them by the same lawyers who now act like they want to play nicely with these parties. It is not fair, and that's why the rules exist to prevent it.

THE COURT: Okay.

MR. RAITER: And the Special Master on the communication side, Your Honor, he said I have to strike a balance here. They have interest to get this discovery but you have interest in making sure the communications are proper and there is no undue influence and he struck a balance, and when you look at his orders and you look at how he got here he clearly was within his discretion. He clearly applied the right law. They don't suggest otherwise, they say the law doesn't apply because of the unique facts of the case but he's well within his discretion, and you should affirm this order. Thank you.

MR. DONOVAN: Briefly, Your Honor.

Let me be real clear, we specifically assert and I think made very clear in our briefs we believe the Special Master was completely wrong as a matter of law in applying the absent class member case law cited to him by the auto dealers, the depositions of these non-party auto dealers in

the end payor case. We would need this discovery in the end payor case if the auto dealer class didn't exist, we would need this discovery in the end payor case if there was no class action at all. We need this discovery in the end payor case to find out the facts about whether or not there was pass on in the specific transactions on which the end payors are basing their claims. There is no case -- not any case cited by anybody that suggests that the principles that govern discovery of absent class members apply in the circumstances here. It was wrong as a matter of law.

And even if there were such cases he misapplied the balance as a matter of law. The principle under which discovery of absent class members is restricted is because of the expectation that the class representatives, the auto dealers, will provide discovery necessary to litigate the claims. Everybody agrees from day one, the Special Master acknowledged in his September 3rd order that the auto dealer plaintiffs can shed no light at all with respect to the purchases by the end payors. None of the auto dealer plaintiffs, none of the class representatives sold any of the cars to the end payors. The only auto dealers who can shed light on these transactions, who have the key evidence to those transactions, are non-parties and they are not parties in the auto dealer case and they are not parties in the end payor case, and to the extent to which they are

participants in a provisional settlement class that settlement is in the auto dealer case and it has absolutely nothing to do with the discovery which we are entitled as a matter of law in the end payor case.

THE COURT: Okay. Thank you.

MR. DONOVAN: Thank you, Your Honor.

THE COURT: Interesting issue and interesting argument. The first issue is whether or not the Master applied the appropriate law when he ruled regarding the absent -- his ruling that the auto dealers are absent class members, and the Court finds that he did err as matter of law. The auto dealers are not absent class members in the end payor case. This is a separate case. Even though we have provisional settlements in the auto dealers' case those provisional settlements which, of course, affect these absent auto dealers does not change the circumstances under which they are fact witnesses, and I would assume critical fact witnesses because it is the only place you can get this information in the end payor case.

So I do find that there was an error of law. I respect what the Master tried to do to balance things and get things moving along, but we can't balance that which doesn't exist, so that's the Court's ruling. Along with that court ruling, then counsel for the defendants may speak to lawyers for the non-party auto dealers and there is nothing improper

about that, or the auto dealers themselves if they do not have lawyers.

Now, there is still -- having said that and that is my ruling, whatever cooperation again you can do with the class counsel versus the individual counsel letting class counsel know what's going on I think you need to do that. That's a matter of -- that's a matter of litigation respect but it doesn't change the law as this Court is determining it to be. Okay.

The next case is the September 29th order I believe.

MS. ROMANENKO: Good afternoon, Your Honor. Victoria Romanenko for dealership plaintiffs.

Your Honor, before we get started I would like to note there is a possibility of highly confidential information being disclosed in this argument. If possible, we don't have an issue with any counsel being in the courtroom but if it is possible not to have the media we would appreciate it.

THE COURT: The media?

MS. ROMANENKO: Or the press.

THE COURT: Do we have any press here? I guess we have one. I didn't even know that. Okay.

When you get to parts that are confidential would you note that for the record so that would be sealed in

whatever information that it is that you want to be sealed?

MS. ROMANENKO: Yes.

THE COURT: Okay. Thank you.

MS. ROMANENKO: Your Honor, this appeal before you today is very different from other appeals Your Honor has heard before. This is an order on a series of very important issues that were never briefed to the Master or analyzed below. You will see from reviewing the order and the briefing in conjunction with the provisions in the order that they simply do not match up with what was argued to the Master below and what the Master analyzed. Also the defendants' brief to the Master focused on a couple of missing fields of data, what we got was an order calling for extensive non-testifying expert discovery, backup discovery that had altered our negotiated stipulation with the defendants, and a series of other issues that were never briefed or analyzed.

THE COURT: Let me stop you there because I have some questions on experts and what you consider an expert.

Now, as I read I believe it was an affidavit from one of the -- what is it, the DMS folks, the data is the data gotten from the dealer so it is the dealer's information, right?

MS. ROMANENKO: I'm sorry. You referred to an affidavit?

THE COURT: Well, one of the DMS providers talked about this isn't our information, it is the dealer's information. I agree with them, all of this information that they gather is from the dealer and they are almost like a keeper of the records, it is a way to keep the records, to organize the records in this electronic age. So these DMS, as I understand it, really provide a software function, they provide a program to process all of this or store this information. Is that your understanding?

MS. ROMANENKO: Correct. The DMS provider provides the software and the functionality and the support for the -- to host the dealer's data.

THE COURT: Okay. Now, may the DMS person or company they may have the data in their own location on their computers or it may be in the dealer's -- I think this one affidavit said mostly it was in the dealer's, which I was surprised?

MS. ROMANENKO: It depends on where it is hosted, but to clarify, that's not who our consultant is.

THE COURT: Well, that's what I wanted to get to. Who was your consultant? Is your consultant somebody who works with the DMS to pull out this information?

MS. ROMANENKO: So to go back for a second, the defendants came to us saying we want all of this data from your clients, get it from their systems. Most of our

clients, you know, are small businesses, they are lay people, they wouldn't be able to perform a large 200-field extraction covering ten years. So what we did was we did some footwork and we located a consulting entity, it is not a DMS provider, who worked with our clients on our behalf to gather their data from their system. They did not -- they are not the DMS provider or an extension of the DMS provider, they are an expert in DMS systems who specialize in mining those systems for data, creating these kinds of reports that we produced to the defendants. They are an entity that we retained to work with us as an extension of counsel in order to be able to produce to the defendants these data sets that they were seeking from our clients. And we have been interfacing with that entity in order to learn and better understand how these systems work. We have had them interfacing with our clients, gaining their confidences, their special information about their systems, going in over and over again to locate this information to produce to the defendants. So it is similar to any other expert in a litigation like this that is aiding with and shedding light upon a discovery function like, for instance --

THE COURT: But these experts are really extracting information requested by the defendant, they are not analyzing the information, right, or are they?

MS. ROMANENKO: They are analyzing how to get the

information. We have had a number of communications with them in which they have educated us on how these systems work. That's been a persistent issue in this litigation.

THE COURT: Well, because you need education on how the systems work, but in terms of what they are doing they are not doing any analysis for you saying this is what this means or they are not doing any analysis for the defendants, they are simply pulling out fields in a record?

MS. ROMANENKO: Well, no.

THE COURT: No?

MS. ROMANENKO: No. For instance, we will say what does this field mean or what does it mean that there is this kind of value in this field, and they will tell us because this is a specialist that has been in a lot of different DMS systems and they will explain to us. Or, for instance, different of our clients use different DMS providers and that sometimes changes --

THE COURT: But isn't that the client that says this is the information I need to save, this is the price? Now, maybe DMS calls the price field amount maybe and maybe they use A, B or C but it is -- they are not determining what the information is, this is the information that is given to them by the dealership, right, that the dealership wants to maintain, so they set up a system?

MS. ROMANENKO: The dealership doesn't usually make

its own determinations about what a field is or --

THE COURT: Well, maybe not but they certainly have to make their own determination as to what's to be preserved. I mean, why would a data management system person come in and say well, I want to preserve just half of your information or I want to preserve A, B and C, how would they know? They've got to learn the business from the auto dealers, right?

MS. ROMANENKO: Well, for instance, we will say to them I see that there isn't -- I see this field and there isn't data in there, what could that mean?

THE COURT: You see what?

MS. ROMANENKO: We see a particular field, a category, and there isn't -- it is not populated with data, I'm looking at my spreadsheet and there is nothing there, what could that mean?

THE COURT: Right, and they might say well, this is a cash deal so there is no amount of a loan, say, or -- but that would be something the auto dealer would have told them when they set up the system that what we want to preserve is this piece of information, so why would you be -- you would be asking them because they probably have the protocol for it all written down but technically it came from the auto dealer, right?

MS. ROMANENKO: They don't ask the dealer to answer our questions. So, for instance, if we say I'm looking in

the CDK system for my client X and I see this name, what does that mean and does it have this kind of information or this kind of information? Because they have seen a lot of different dealer systems and because they have had a lot of experience with this they can tell us what that means, or if we say, for instance, they have -- there's this many years of data and I'm trying to understand why that is, and they can explain to us why that is. A dealership sometimes they don't even know how many years of data they have. Like, for instance, you know, a lot of our clients told us we might have five years and then later we find out no, no, no, there is actually quite a bit more there.

THE COURT: But that would be because the DMS system didn't purge the records of the previous five years so we only have five years of information but when you go to look at it you've really got 10 or 15, maybe 20 because that's a data processing thing and they didn't bother to purge it, so there may be more information than the dealership knows. I agree with you on that, your client may not know that and the DMS provider would. I'm just trying to get to what makes them an expert in this case. I mean, they are experts in data management, there is no question about that, but are they -- they are all of your records, they are all of your records?

MS. ROMANENKO: Right, so they are an expert for

instance like any kind of predictive coding expert that a defendant might hire, an entity that will run an algorithm to allow them to make a determination about what documents might be responsive, what documents may not be responsive. Rule 26 with regard to expert -- testifying and non-testifying experts doesn't say we don't apply this rule to an expert that's being used in a discovery process, it doesn't have exceptions, it creates a non-waivable concrete protection for any kind of consulting expert that we, the attorneys, might be working with in order to aid us in carrying out the functions of the litigation.

So like, for instance, we cited to Your Honor the Genesco case where the law firm hired a computer consultant to help with carrying out the litigation. That's similar to our consultant. What makes them an expert and covered by the rule is that they are a specialized entity working with and at the direction of counsel to carry out these functions. It is something that we need done in the case that we can't do, that our clients can't do, and it is something where we need to get an understanding of how these systems work and our clients, they are lay people, they can't provide us with that understanding. We have had a large amount of briefing on this issue, Your Honor I am sure saw it come across the docket, so we have needed to have many hours of consultation with this entity to get an education on how this system works

and how one would go about extracting data.

THE COURT: Let me ask you this, if you had a small dealership and it is keeping its records on the computer and has somebody who works for the dealership there entering, you know, a data record, say, let's look at a small data record, ten fields, it might have the name of the purchaser, the type of car, very small records, and the employee is a direct employee of the dealer. The defendants come in and they say we want to know how many cars were sold and how much they were sold for total, and this person at the computer, you know, hits these buttons and he comes up with these totals, would they be able to ask this person, an employee of the auto dealer, well, how did you find that information? Would they be able to ask them that?

MS. ROMANENKO: Would the defendants be able to ask them that?

THE COURT: Yes.

MS. ROMANENKO: If the employee had the ability to run that kind of report they might be able to ask them that. In this instance what we found is the kind of comprehensive report that's being requested, most of our clients probably can't run, and that's why we have had to go out and get help from a consultant. So I guess your question is if a defendant wanted to ask one of my clients -- let's take one of my smaller --

THE COURT: What if the defendant wanted to ask your consultant how did you get that information?

MS. ROMANENKO: If they wanted to ask the consultant the consultant would have an answer but, of course, here because it is work product they are working at the direction of counsel, they would provide the information to counsel, counsel would provide it to the other side, just like the defendants are entitled to protections. To be clear, it is not just they are non-testifying consulting experts under Rule 26, they are also entitled to work product protections even if it were --

THE COURT: Their own work product, in other words, whatever programs they designed to draw out this information would be their work product, right?

MS. ROMANENKO: Well, any communication or anything created for counsel would be their work product so just like, for instance, there would be any protection accorded to somebody that worked on a document, like if somebody hired an outside entity to work on a document production with a client, the communications with counsel, e-mails that pass back and forth, that would be work product because if counsel is entitled to work product protections and counsel is working with a vendor or an expert that is working as an extension of counsel to perform a function that counsel can't perform and that counsel's client can't perform, then

necessarily those work product protections have to extend. Otherwise, all of the information that passes between counsel and the expert or the vendor is going to get revealed, it is going to be thought processes, it is going to be opinions, what did so-and-so say to you, what did you say back, what was the thought here about how we are going to go about getting this, why is it needed, what was the initiative of this?

THE COURT: Do you have like one consultant for all of your dealerships or is there different consultants for different DMS systems?

MS. ROMANENKO: So as far as producing data from a live DMS we have one consultant who does that, we have other consultants who deal with some of the backup tapes.

THE COURT: Then there was one case in which the data from the DMS provider was different from the data from the consultant that was cited in the brief. How do you explain that?

MS. ROMANENKO: So early last year when the defendants had subpoenaed these DMS providers there was one fairly small one that was willing to produce some data, and they produced data for a couple of our clients. There are a couple of things that we need to note. First of all, as we have mentioned, there are differences between a DMS provider and an entity like our consultant. The DMS provider, they

design the system, work with it constantly, they can run whatever report they want. They are in a different position than a third-party consultant like ours who comes in as a stranger and goes in from the back end and is looking for data.

But more importantly, our stipulation with the defendant says we have to produce non-duplicative data so the defendants say we received certain fields of data from the DMS provider and we didn't receive it from your consultant. Our understanding from our stipulation that we negotiated is that we didn't have to produce duplicative fields of data that they had already received from the DMS provider.

THE COURT: So you give them a blank record then because we already did that?

MS. ROMANENKO: Right, so with regard --

THE COURT: What kind of program would do that? I'm just trying to think why would you write a program to say -- I mean, how would the program even know you got it from somebody else?

MS. ROMANENKO: Well, I'm saying that with regards to these specific fields, these are fields I think we have mentioned in our briefing, these are fields that are more difficult to get and considered to be more ancillary, they are not the core fields like what was the VIN number and how much did the car cost, how much did you sell it for. They

are things like

. They are more removed, they are more difficult to get, and we understood -- so we understood that when our consultant went in they didn't have to do the extra work to get those fields that had already been provided from the DMS provider.

THE COURT: I see, so you excluded those fields, you didn't ask them to get those fields basically, your consultant?

MS. ROMANENKO: No, we sent the full list of fields to our consultant but we didn't push for those fields for the entities where the data had already been delivered because we already had a stipulation in place that stated we didn't need duplicative data. For the record, we did ask, you know, what would you do if you needed to get this and they said well, we have to alter our processing tool.

THE COURT: Right.

MS. ROMANENKO: So that would be the extra burden to get those other fields which we understood these are taken care of, you got these in March, you didn't need to also get them from our provider.

THE COURT: Are you asking for the depositions of the defendants' data processing people, I mean, is this a reciprocal thing?

MS. ROMANENKO: It is not reciprocal. I'm glad you

asked that because the defendants put in a deposition notice that we are seeking information about data processing systems the defendants use, and what they said is we are going to answer those questions by letter from counsel, and they said we want to -- we want to deal with any data issues not by providing testimony, not by giving you any outside entities that work on this, but by counsel making representations via letter about any questions you have about data. That's the same thing we have offered to do is to have counsel respond by letter to make -- to provide any answers that they need regarding the data so that we agree, there doesn't need to be testimony, we don't need to take away the protections of work product and Rule 26 and get behind how all the discovery was done, go back over it, spend a bunch of time on that. We should exchange letters so that everybody can have the questions, we can do it in an efficient manner and counsel can continue to be the primary point person for providing this information as has always been accepted. And Your Honor will see the representations about discovery available, unavailable, it is always done in letters from counsel. If we have to have a declaration from any entity that ever worked with any counsel we would be here for years, not just because it is a highly --

THE COURT: We are going to be here anyway.

MS. ROMANENKO: Even more years.

Not just because it is highly inefficient and expensive but also because everybody would be objecting, everybody would be filing motions for protection. The defendants don't want to put their experts or vendors or consultants up either. It is a violation of work product and Rule 26 protections. There is a reason why counsel is an officer of the court appointed to interface with opposing counsel to iron out these issues, to answer any questions that need to be answered and to contend with this in the way that the rules contemplate. If we take all of that away nobody is going to be able to use their experts anymore.

THE COURT: Okay. Thank you. Response?

MS. ROMANENKO: Your Honor, may I briefly address the backup issues?

THE COURT: All right. Briefly.

MS. ROMANENKO: I will be brief. So with regard to the backup issue, this is another situation --

THE COURT: Are we talking here specifically about backup tapes? I know that was referenced.

MS. ROMANENKO: We are talking about backup media which includes backup tapes.

THE COURT: Okay.

MS. ROMANENKO: On the backup issue, again, that was not briefed or analyzed by the Master, that was not an issue in the motion to compel. What happened is that at the

end of the conference counsel for defendants suggested to the Master that we agreed to provide counsel for defendants with a list of all backup media, and that's not correct. What we agreed to do in our stipulation on discovery regarding backup media was that we would provide a list of any backup media that covered a temporal period that was not covered by our existing data production but which backup media wasn't used for our production because we found it was not reasonably produceable. So we really tried to narrow this dispute. We don't want to fight about this expensive and burdensome type of media when we don't have to, it is not going to add anything.

Giving a list, that's an invitation for more back and forth, maybe more motion practice. We said we are going to give you a list if there is something out there that we didn't produce to you because we couldn't and maybe it would have some value for you in filling in gaps. That was very specifically negotiated. The only reason that the Master rendered a ruling that changed this order is because he was -- he was misrepresented to regarding what the order said. There was no briefing about we want to expand the order, we don't like what we negotiated with the plaintiffs, we want more information. Simply what occurred is that counsel for the other side suggested to the Master that the provision was different than what it really was, and we are

simply submitting that we not be put to the extra burden, that there not be extra fights created because the Master was misinformed about what the order said.

THE COURT: The backup data, as I understand, backup data could be extremely expensive to go through, particularly if it is tapes it is almost impossible?

MS. ROMANENKO: Correct.

THE COURT: Okay. All right. Let's hear a response.

MR. CAROME: Your Honor, this is Pat Carome from Wilmer Hale, counsel for Denso, and speaking on behalf of wire harness defendants.

This objection is subject to the abuse of discretion standard. This is a matter that Master Esshaki has been riding herd on for more than a year. In fact, it was back in 2013 that this transactional data was first sought from the plaintiffs.

We have been having to fight tooth and nail, first just to get the plaintiffs -- the auto dealer plaintiffs to admit that this data even existed. For more than a year we were told there was no such transactional data, that this information was only going to be available in paper form in individual deal files. We, back in December of 2014, 14 months ago, learned on our own -- the defendants learned on our own that, no, it is commonplace for auto dealers and,

in fact, it is true for all auto dealers as far as we can tell, they have these DMS services and these DMS systems. And this is the information they put in -- they input it at the dealership into these systems. They -- the DMS providers provide software and sometimes provide hosting for it. Now, we had to spend more than a year and a half dealing with a situation where we are being misled that this didn't even exist. Then in --

THE COURT: Is it because counsel didn't know existed or --

MR. CAROME: Your Honor, I'm not going to speculate about that. I find it stunning that counsel as experienced as this could not have known well before they filed this suit that the most basic information -- the most basic transactional information relevant to their claims didn't know its existence. It is astonishing to us that this happened. We are past that. That's water under the bridge.

The defendants learned on their own through their own investigation that these systems do exist. And so in -- there was a motion to compel the production of this information that was to be heard by Master Esshaki last December, over a year ago, and there were also -- that is when the defendants started to go to the DMS providers themselves, the vendors, to try to get it from them. Auto dealers screamed bloody murder about that. Ultimately on the

eve of that hearing auto dealers said no, no, we don't need to have a motion to compel heard before Master Esshaki, we will go get the data from -- on our own from our -- from the DMS providers, and there was a stipulation that was signed and entered by the Court in the beginning of January, January 7th, over a year ago, saying that the auto dealers would go and get all of this DMS data from their DMS providers and produce it all by March 15th.

Well, the result of that was near complete failure. They came up with -- the DMS providers produced the -- the auto dealers came forward with DMS data for only three of the then 45 auto dealer plaintiffs, and they turned over to us two of those sets of data, they came from the DMS provider. The third, the dealer at the last minute decided that they didn't want it to be turned over and that dealer, Holtzhauer, is now out of the case. So that was a complete failure that Master Esshaki had attempted to manage, and so we had to start again, and so we brought on motions to compel directly against the auto dealers that they produce the data, however they needed -- wherever they had to get it from, whether from their own computers on site or if it is easier to get it from the DMS provider, well, then go and get it from the DMS provider. And on the day before that motion to compel was to be heard before this -- before Master Esshaki, it was to be heard the afternoon of I think

the May 6th status conference last year, we reached a stipulation finally in which -- again, with the auto dealers in which some 200 listed fields of data for each auto dealer plaintiff would be produced to us. And there was a --

THE COURT: And did the auto dealers agree on these 200 fields ultimately?

MR. CAROME: Yes, auto dealer counsel signed a stipulation to that effect that all 200 fields would be produced to the extent --

THE COURT: Did it include those fields, field and --

MR. CAROME: Each -- every three of those was specifically laid out, specifically laid out and agreed to.

THE COURT: Okay.

MR. CAROME: That set a schedule for a rolling production of that DMS data starting in July and ending September 9th. I have to tell you, Your Honor, even today here in January we do not yet have all of that data. We are still waiting for supplemental productions. We were promised in December just almost two months ago -- I'm sorry, a month and-a-half ago that oh, yeah, there is another supplemental production, it is coming out, we will get it next week, we will get it to you. We haven't gotten that. There is a huge amount of data that they have admitted exist that we still dont have, but that's not really what we are talking about

here.

So we did get some of those productions of DMS data, and the hearing before Master Esshaki -- when we got the first tranche of that data we noticed immediately that those three fields were altogether missing, altogether empty, even though we had seen those fields in the data we had gotten through for two of the dealers.

There was also a lot other missing data. I mean, for some dealers produced no data at all, some dealers who have -- sell multiple brands of vehicles produced data for only one of those brands but not the others, and we saw these problems with that very first production that they made in July. We wrote them a letter and said hey, there are problems here, data is missing, these particular fields are missing, we don't understand why there is no data for some dealers, we don't understand why there are so few years for other dealers, it seems like a mishmash. We said whatever but we asked them please talk to us about these problems now so that your second and third tranches under the stipulation aren't similarly problematic. Well, we -- they refused to talk to us.

They made their second tranche and it still had the same problems including those three missing fields but other problems as well. And then they -- and they then finally made their third, and we said hey, look, there is still all

of this missing stuff, we don't understand it, it is inconsistent with what was produced before, we need to get a clear expedited date by which you will promise to give us complete production. This is just a production of data. We have been trying since 2013. Master Esshaki has been having to intervene repeatedly. They refused to provide us with any deadline or to really discuss at all what those problems were, so we then brought another motion before the Master to say look, there are problems with the productions that we are seeing, we want to get an order that fixes a fixed date for all of the data that is reasonably accessible and produceable that is within the scope of the stipulation to be produced.

We had a hearing on September 24th. Now, by September 24th, the date of that hearing, they had completed the third tranche of production, if you can call it completed, they made that third tranche. They had also told us about some backup data that the stipulation clearly required them to provide a list to us, one, it required them to produce to the extent they didn't have live DMS data, it required them to produce backup data to fill the temporal gaps to the extent that it was reasonably accessible and produceable. They produced zero backup data even though they had promised to produce that to them. Now, maybe it is possible that there's none that's reasonably accessible, but we are somewhat dubious of that, but to the extent that they

had backup data that might fill these temporal gaps and that they had deemed to be not accessible or produceable they had to provide us with a complete list of that data so we could access it, perhaps even have our experts look at the backup data and see if we find it to be reasonably accessible.

So there was a hearing that lasted about two hours. Now, there were a couple of other motions that were heard but by far the bulk of that hearing before Master Esshaki was about these DMS data production issues and the backup, and Master Esshaki --

THE COURT: Are those hearings on the record?

MR. CAROME: It was not, it was not on the record unfortunately, but the -- we brought to Master Esshaki the full range of problems we had now seen in the incompleteness, the mishmash of data, the very small periods of time for some dealers, the fact that various brands that dealers were selling we were seeing no DMS data for, all of these things we brought to his attention, and I think he, recognizing that this had been going on far too long, said I'm finally going to issue an order that tries to get this long-running problem that he's been managing to the best of his ability resolved as quickly as he can. And so he issued an order on September 29th which provided the auto dealers with a 30-day deadline to finish this up once and for all, and it was to produce all of the data they were required to produce under

the order to the extent it exists and is reasonably accessible and produceable, 30 days from then, so by October 29th.

THE COURT: Was that date earlier than a previously-scheduled date?

MR. CAROME: No. In fact, that date was -- this was all supposed to be done by early September, the entire process was -- at least the DMS productions was to be done by early September. There was some additional deadlines for sorting through the backup data. The stipulation was very clear in spelling that out and there are other provisions for if there is no data at all for us to get the hard copy files, that's not subject of this -- that will be subject of motion practice shortly but that's not subject of the order on review here.

So Master Esshaki set a firm deadline, finish it all. He didn't add one wit to what the May 12th stipulation required, not one wit. He also said because there is so much confusion over why data is missing, why what we are seeing here is different, why there are these inconsistencies and because we were not able to get any information at all from auto dealers about this because they said well, our -- what the auto dealers said is, look, our vendor does what our vendor does, and we are not going to tell you who our vendor is, we are not going to -- our vendor -- we just get what the

vendor gives us and that's what you get, and that -- well, let me finish the story. So ultimately he issued this order and he also required that there be some affidavits, one from the data-retrieval technician and one from the backup service -- their backup analyst, and the purpose of those declarations --

THE COURT: But you say data retrieval technician?

MR. CAROME: That's right, that's what this is.

THE COURT: Is this the expert that --

MR. CAROME: Well, that's their, quote, consultant.

THE COURT: That's their consultant.

MR. CAROME: We've heard more about who this consultant is today than we have ever heard before, it is not actually a person, it is a company, but it is a vendor doing what in most litigation is done by the litigant itself, retrieving from its own files, here electronic files, information that is required to produce in discovery. This is information that employees of the auto dealers entered into some system sitting at some computer and now it is -- and now it is highly relevant to this litigation and we are entitled to it. There is no -- this -- this data-retrieval technician or consultant, whatever you want to call it, is by no means an expert in the sense that Rule 26 covers it. They are doing nothing relating to the merits of this case, this is just the basic collection of data, and we are left right

now in a situation of being told this black box did whatever it did and we are not going to tell you what it did and it has produced this data and you just take it or leave it.

And we see all kind of reasons to believe that the data is incomplete and lots of doubt, and Master Esshaki saw that as well, and he said I'm going to have this vendor that you want identified, he or she has to provide an affidavit saying these are the procedures I used at each of these auto dealers, here is what I was able to find, here is why I wasn't able to find the other things that are supposed to be produced. It is very straight forward. If this was normal litigation of course we could take discovery of the employee at the litigant that handled that discovery.

Auto dealers and the other plaintiffs in this case in their 30(b)(6) deposition notices to defendants sought precisely that kind of information in the notices they originally issued. Now we have -- those -- it may not be necessary for the defendants, defendants have been answering -- have written hundreds of pages of letters responding to questions about our transactional data, and it may be that the -- a deposition of somebody at one of the defendants isn't going to be necessary on that topic. Here they have refused to -- we sent them some questions about this data two months ago, haven't gotten a single response to it, and we can tell given all of the back and forth to date

about this being just tooth and nail to try to pull this stuff, we need to get to the person who is pulling the data to understand why aren't you finding the other things that we would expect you to see. It couldn't be more basic.

THE COURT: But are you in seeking from this consultant -- this affidavit I'm concerned about, are you seeking that consultant's work product?

MR. CAROME: No.

THE COURT: This is the program that we have developed?

MR. CAROME: No, not at all, we are seeking the basic facts; what data exists, what data were you able to retrieve, if data is unable to be retrieved, why can't it be retrieved. We are not asking anything about whatever processes it is using, whatever its secrets are it uses to pull data, and we are not asking the sorts of things that auto dealers' counsel suggested about the communications between auto dealers' counsel and that vendor. We don't have any need to hear a word about that, we just need to know what did the vendor do to go in there and pull data, and to the extent required data isn't being located and produced what's the reason. That is just basic fact discovery. It has nothing to do with work product. It has nothing to do with experts. We are not even in the right box when we are hearing objections based on work product or Rule 26 grounds

to this. It just couldn't --

THE COURT: So of these 200 fields, let's say, that you are requesting and you have stipulated.

MR. CAROME: Yes, auto dealers agreed that these were to be produced.

THE COURT: Okay. And these 200 fields are technically fields in the record of most auto dealers, maybe some didn't keep track of all of them?

MR. CAROME: That's right, sometimes these fields are going to be empty because that particular dealer just never kept track of that particular item.

THE COURT: Is there a standard amongst these DMS for these fields for auto dealers or not?

MR. CAROME: There's certainly a lot of -- amongst all the DMS providers as far as we can tell there is -- I would say 85, 95 percent of the data is all the same, you are keeping track of all the same pieces of data.

THE COURT: So are you asking basically for a printout -- not a printout -- well, an electronic printout let's say of this data that they have in their systems? Are you asking for it to be manipulated in some way?

MR. CAROME: Your Honor, that's a very interesting question. We would have been happy to just get the data however it is.

THE COURT: Then you can manipulate it however you

want?

MR. CAROME: Yes, exactly. Now, auto dealers through this May 12th stipulation said no, no, here's what we will do, we will agree on these particular 200 fields, we will have -- and apparently what -- they didn't tell us this but apparently what they had in mind is that they would try to produce a single common report of data from each of the dealers using whatever approach the vendor had. They didn't need to do it that way, they could have just given us the whole data as is, that would have been fine, or they would have -- they said well, all right, in fact, there are 220 fields, they could have stripped out the 20 and given it to us as is, that would have been fine too.

Instead they've gone in and decided to just outsource to this vendor the process of pulling it and apparently deciding to sort of present it in some uniform format. We don't need it that way but they have gone to the trouble to do that. The problem here is the vendor is -- we can see particularly with these it is some -- it should be there and for a whole bunch of the dealers it is not there, it is not just the two where there is this overlapping issue, and it is not the case they thought it would be easier since we already gave it to you before we are not going to --

THE COURT: Did they give it to you before?

MR. CAROME: For some of the months, but it didn't -- it only went through the spring of 2015, there wasn't a complete overlap. In fact, it -- there are six months where there is no overlap and we didn't get it before, the more recent six months, but the bottom line is it is not just those two dealers for whom we didn't get those critical fields, it is more than half of the dealers I think, it is certainly a very substantial amount of the dealers, so their explanation that that's why you are not seeing it just completely collapses.

With respect to the backup issue, maybe I have said this partly already, counsel suggests that there is some new requirement to provide a list of the backup data that they -- that may fill the gaps where there isn't live data but that their vendor deemed not accessible for some reason. They have to -- they already had to give us that list. The May 12th stipulation point blank requires that. What Master Esshaki added, and it was perfectly reasonable, was that I wanted to get that backup vendor to tell me why, you know, which backup media did you look at from each dealer and to the extent that you deemed it not accessible you can't get data off of there, give me a reason why. That, again, they outsourced that function, that is a perfectly reasonable thing to do, and during that September 24th hearing Ms. Romanenko herself told Master Esshaki that they had sent

-- either had or was about to send hundreds of backup tapes to some vendor which they have never identified to us in any of the lists they are required to produce, they have only identified two or three pieces of backup media to us.

THE COURT: Now, are these backups strictly for temporal, like we don't have any records --

MR. CAROME: Right, we don't need --

THE COURT: -- beyond the last five years?

MR. CAROME: That's right. Some of these auto dealers have DMS data even though it is a 15-year class period only for the last couple years, so if there is backup data from which transactional data can be pulled for part of that period that would be highly valuable. Actually I would think the auto dealers themselves would be scrambling to get that themselves to be able to prove their claims, but in any event it is highly relevant, it is needed, maybe some of it won't be able to be used, maybe a lot of it won't be able to be used, but if some of it is there and can extract a useful data from it we are entitled to it, and so this declaration or affidavit that Master Esshaki required again is just a very reasonable thing to be doing to try to bring some closure to a problem that has been festering for years in this case. He did a very smart thing, the notion that it could possibly be an abuse of discretion to do that I suggest is astonishing.

THE COURT: Okay. Thank you.

MR. CAROME: Thank you.

THE COURT: Reply, briefly?

MS. ROMANENKO: Your Honor, you spoke about acrimony earlier today, and most of what we just heard from opposing counsel's argument is not an analysis of work product, is not an analysis of Rule 26, is not any argument about why there might be exceptional circumstances to take away the protections of Rule 26, what kind of undue hardship would be posed for defendants by not getting the information. It is a mischaracterization by counsel of the history of this dispute. It is exactly the kind of acrimony that we have been talking about avoiding, and it is also incorrect. What counsel points to, the letter that was sent from my colleague in the spring of 2014, was with regard to specific procurement information. Opposing counsel asked us please give us all the information on an invoice, and so we asked our clients how do we get that and they said you have to copy the invoice. Now, wouldn't it be the case that if we could just get it electronically, if our clients could do this for us, that's how we would get it? Of course. There is no misrepresentation made to opposing counsel about this.

As far as you know our other statements and opposition to their motion to compel, we asked our clients, again, defendant served these broad requests asking for every

detail of a sale, what would you do if you have to produce this? We would have to copy the deal file.

Mr. Carome mentioned the January stipulation we entered into. They had subpoenaed the DMS providers, the entities that hold our clients' data, because we opposed, which is a procedure the Master has now found is improper, and we said okay, if that's going to do it for you then we will agree that if these subpoenaed entities are willing to produce the data to you then you will get this data. Those subpoenaed entities, the vast majority of them, they opposed, they filed motions to quash, there was only one that served a minority of our clients that agreed to cooperate, so it is not that we didn't do our job or we missed a deadline, the third-party entity that we agreed could produce this data declined to produce data.

THE COURT: Well, wait a minute. This is your data so how can they decline to produce it? I mean, they may need to be paid to do it, I don't know, were you trying to get it for free or something, but it is your data, they can't say.

MS. ROMANENKO: We offered to pay them because they have to do a specialized process to locate it, to perform the extraction, to clean it up, to process it and to present it to opposing counsel. Believe me, we would have loved for these DMS --

THE COURT: Well, they should have been brought in

because I don't understand that, they have your data.

MS. ROMANENKO: Well, what they said is this is extremely burdensome for us, for us to find all of these fields of data that cover this huge time period poses more than a burden than we are willing to undertake, even if you paid us we need to have this many programmers working to build tools for this, we need to unearth this much archived information, we won't do it, we have too much else to do, this is excessive. And, Your Honor, you can imagine that if a professional data management systems provider says this is burdensome how burdensome it is for our clients and how much extra specialized work it is for our consultant.

THE COURT: But I guess I'm going back to try to figure out what this data is because I'm still on these 200 fields. Is this something besides these 200 fields?

MS. ROMANENKO: What the subpoenaed DMS providers were initially asked for was more than the 200 fields.

THE COURT: You have narrowed it down to the 200 fields?

MS. ROMANENKO: Well, after the subpoenaed entities filed motions to quash we located a consultant and we provided 200 fields to defendants -- actually it was less than 200 fields, they added a couple, and they actually asked us can we add these fields and we said, yeah, if they are reasonably produceable and reasonably accessible, meaning our

consultant -- they knew about the consultant all along has to be able to locate them and, again, as I have said, they have to do a lot of specialized work, it is not as simple as some core piece of data. Now Mr. Carome said we are not asking about their work or their method or opinion but that's not the case, the Master ruled they have to disclose the processes that they use to come upon this data and then provide their opinions about why some of it might or might not be available, and the Master did this without ever doing an analysis of work product protections, protections for non-testifying consultant expert witnesses -- not witnesses, non-testifying consultant experts without doing any kind of analysis, and so this review has to be de novo, it is not abuse of discretion. If he didn't follow the protections that the federal rules provide for there has to be a de novo review by Your Honor.

Now the defendants make a lot of noise about what was missing. They filed the motion that dealt essentially with these three fields that they mentioned. Our consultant provided huge amounts of data, they did an enormous amount of work, we did three waves of production, and then, Your Honor, after we met with the Master we did a supplemental production, they have gotten a lot of this information and so this is not a remedy or a punishment to somehow deal with a defective production. 200 data fields is more than some of

the defendants have been willing to produce, this is an enormous undertaking that we have done and we have done this with the understanding that this is going to satisfy them, we made that supplemental production thinking that this is going to be the end, not that there is going to be more discovery going behind what our consultant was thinking, what were their methods, how communications with us might have informed them, what happened when they didn't find this, what happened then, and all of this extra discovery into what they did and essentially our work product.

So, Your Honor, regardless of whether you agree that this is an expert or that discovery experts are excluded under the non-testifying expert provision, this is work product and even on that basis it shouldn't be produced.

Now, Mr. Carome said they need this information. They have never asked for this information. They have been getting data since March of last year, they never made a request, it wasn't in their motion, it wasn't anywhere.

THE COURT: Wait a minute. For what information, what are you talking about?

MS. ROMANENKO: For the affidavit from our consultant describing what they did and why something might not be there. And, Your Honor, they have tried to paint this as a way to deal with multiple deficiencies but, again, their motion focused on three fields, it is not a way to deal with

excess deficiencies and I can't imagine that all of these protections should be taken away because they raised a motion about three fields being missing. Your Honor, we didn't say our consultant will do whatever they will do and we can't provide an explanation. We provided an explanation and we said there are lots of -- we asked them, why may data might not be found? There are lots of reasons.

-- I'm getting into highly confidential right now.

Mr. Carome also said they are missing data for a number of dealers. As I think is made clear, the dealers for whom data is missing are a couple of out-of-business dealers, not dealers that had a live DMS system that our consultant

could go into and perform a data pull to create the report that defendants were looking for. So it is not a deficiency on our consultant's behalf that caused the lack of data.

Now, as far as the backup we certainly never said we wouldn't produce backup but unfortunately after spending thousands of dollars we found that the backups that we have identified that do fill a temporal period not filed by the live data are not accessible. For instance, a lot of them are encrypted with old software that our backup consultant can't get anymore, so they can't get the data off of them. We have not refused to provide anything, we have not declined to engage with them, we are fully willing and able to answer any questions there are. We have already made an immense production and the notion that this was needed for some reason and that the rules didn't apply here because our production was problematic is completely incorrect.

THE COURT: Okay. Thank you.

MR. CAROME: If I could have just --

THE COURT: One minute.

MR. CAROME: -- 30 -- thank you.

THE COURT: Or 30 seconds if you want.

MR. CAROME: Your Honor, the Special Master didn't ask for these affidavits as some punishment for deficiencies. The Special Master heard some of what we heard just now about well, we couldn't find this, we couldn't find that, and he

threw up his hands and said I can't listen to a lawyer telling me this stuff secondhand and even figure out whether there is a problem here or not, I have to get direct information. So he said I need these affidavits so I can do my job as a special master of deciding whether they have met their discovery obligations. He needs it, he said he needed it, it is not an abuse of discretion to have done so. Okay.

THE COURT: Thank you very much.

MS. ROMANENKO: Just one just very quickly.

Your Honor, again, if the Master needs something we are happy to submit it in camera. He also certainly didn't say that unlike all of the other counsel in the case auto dealer counsel is not qualified to provide answers to data questions or forward explanations from its hired consultants about why something isn't there. To the extent that there is a small amount that is missing, again, we are willing to provide information from counsel, we are willing to send things in camera, but to open up this huge amount of discovery on something that is supposed to be done and over with, that we are supposed to move from so like you said we can meet the class cert deadline is excessive and not in keeping with the rules.

THE COURT: Okay. Thank you. I'm going to issue an opinion in this matter. Anything else before we break?

MR. KESSLER: Your Honor, this is just a

housekeeping matter, but you inquired during the argument whether there was a record before the Special Master?

THE COURT: Yes.

MR. KESSLER: The Court's order actually provides that there be such a record available for the Court so you can see exactly what happened before the Master, but we haven't had a consistent pattern of that being done in terms of a report and transcript. We are more than happy to pay -- on the defense side to pay for the court reporter, but if the Court agrees that would be useful under the order that's something defendants would appreciate having so that when we come up here you could see yourself what the Master was thinking and saying.

THE COURT: I thought we had agreed to have a record?

MR. CHERRY: Yes, Your Honor, the order appointing the Special Master actually provides that there should be a transcript of a hearing, it just hasn't been adhered to. I think the Special Master interprets it also as requiring him to use your reporter, and I think that's been seen as an obstacle perhaps to doing things quickly.

MR. KESSLER: Logistically.

MR. CHERRY: Logistically.

THE COURT: I will talk to him about this because it would be very beneficial. I mean, most of the things I

don't see so, I mean, I guess in a way it would be a waste but those things that come before me it would be extremely beneficial to be able to read the transcript if I am ruling de novo or ruling on abuse of discretion.

MR. CHERRY: I mean, Your Honor, we are obviously happy to use your reporter as well, but if that is a logistical issue I don't think the parties would have any objection to the parties just arranging for a reporter?

THE COURT: Plaintiffs have any objection to use of a reporter.

MR. KANNER: For the direct purchasers, no, Your Honor.

THE COURT: No. Okay. Well, I will work that out and I would appreciate it. I know that Mr. Esshaki said today that he's going to do these telephone calls first, those don't have to be reported, obviously it is just when it goes to a formal hearing. Thank you very much.

MR. KESSLER: Thank you.

MR. CHERRY: Thank you.

THE COURT: Have a good day. We will see you in a few months. Thank you.

(Proceedings concluded at 1:19 p.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of In re: Automotive Parts Antitrust Litigation, Case No. 12-md-02311, on Wednesday, January 20, 2016.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 02/24/2016

Detroit, Michigan